83-708

Office-Supreme Court, U.S.
FILED
OCT 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC. etc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE CONCEALMENT OF BUSINESS RELATIONSHIPS BETWEEN BANKRUPTCY JUDGE AND OPPOSING COUNSEL

# PETITION

WINFORD KENT BISHOP
Counsel for Petitioner
1835 First Atlanta Tower
Two Peachtree St., N.W.
Atlanta, Georgia 30383
(404) 658-1110

## QUESTIONS ADDRESSED TO INHERENT POWER

Whether concealment of the following by AETNA BUSINESS CREDIT, INC., predecessor to lead respondent named herein ("Barclays/Aetna"), in a brief filed in this Court in October, 1980, in opposition to QUINAULT PACIFIC CORPORATION ("Quinault") 's petition for a writ of certiorari (denied as Quinault Pacific Corporation v. Aetna Business Credit, Inc., 449 U.S. 954, 66 L.E.2d 218, 101 S.Ct. 360 [November 3, 1980]), constitutes a fraud under Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 21 L.E.2d 301, 89 S.Ct. 337 (1968), to wit:

A. With respect to Real Property Arrangements under Chapter XII, Federal Bankruptcy Act, copyrighted October 19, 1977, by The Harrison Company, an employer

for hire of UNITED STATES BANKRUPTCY JUDGE WILLIAM L. NORTON, JR. ("Judge Norton") (co-) author */

Where --

(1) Barclays/Aetna's counsel, KUTAK, ROCK & HUIE partner C. EDWARD DOBBS ("Kutak/Dobbs"), wrote portions of said book in 1976 and 1977 (Pet.E.Writ ¶72 **/);

(2) Kutak/Dobbs wrote the 1979 Supplement to said book in mid-1978 (Pet.E.Writ ¶114);

---

*/ Proof is set forth in Petition for Extraordinary Writ ["Pet.E.Writ"] at 129-134, filed as original action in Court of Appeals per Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 [1944]).

**/ Respondent's conscious decision not to file counteraffidavits, as allowed under Federal Rules of Appellate Procedure 27(b) in connection with response below and (denied) motion for fee award confirms correctness of verified petition.

Which provided Judge Norton with -

(3) Unspecified amounts of royalty income in 1978, up to $250 of royalty income in 1979, 1980, up to $600 of royalty income in 1981, 1982 (Pet.E.Writ pp. 110, 102, 100, 96; Petition for Rehearing En Banc, June 22, 1983, at A-1);

(4) A common law copyright in said book from 1976 to October 18, 1977;

(5) A contractual right to royalty income from The Harrison Company from October 19, 1977 to present (Pet.E.Writ ¶116); and --

B. With respect to Norton Bankruptcy Law and Practice, copyrighted September 2, 1981, by Callaghan & Company, an employer for hire of JUDGE NORTON, Editor-in-Chief (Pet.E.Writ at pp. 76-87):

Where --

(6) KUTAK ROCK & HUIE partner HARRY D. DIXON, JR. ("Kutak/Dixon") */ entered into contract with Judge Norton to write Volume 2 of said treatise, to furnish supplementation with new cases, statutes, and to be paid royalties on account thereof (Pet.E.Writ ¶98);

(7) Kutak/Dixon commenced preparation thereof in early 1978 (Id. ¶78);

(8) Kutak, Rock & Huie provided legal representation to Judge Norton in making contract with Callaghan and Company (Pet.E.Writ ¶126);

---

*/ The appearance of one partner of a law partnership in a lawsuit (Kutak/Dobbs) constitutes the appearance of all partners of that partnership (Kutak/Dixon) in the lawsuit. SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977).

(9) Co-"Contributing Editor" ROBERT J. HIPPLE entered into contract with Judge Norton to write Volume 2 of said treatise, to be and was paid royalties therefor (Pet.E.Writ ¶161B);

Which provided Judge Norton with -

(10) $12,000.00 in royalty income from Callaghan & Company (Pet.Reh. A-1);

(11) Advances against royalty and reimbursement of expenses in years prior to 1982 (Pet.E.Writ ¶127);

(12) Volume 2 of said treatise (Pet.E.Writ ¶162A);

(13) A legal ownership interest in a common law copyright to "unfixed" (17 U.S.C. §302(b)) materials which became and will become Volume 2 or supplements thereto;

(14) A contractual right to receive royalties from April, 1979 (Pet.Reh. A-1);

(15) Marketability of said treatise and supplements; and --

C. With respect to Judge Norton's operation of the United States Bankruptcy Court in In the Matter of Georgia Paneling Supply, Inc., Bankrupt, Bankruptcy No. B74-1628A, Northern District of Georgia (June 24, 1974 to June 30, 1981):

Where --

(16) Kutak/Dobbs secretly conducted legal research for Judge Norton over two and a half years (May 5, 1976 to November 14, 1978) in the vigorously contested, pending case In the Matter of Georgia Paneling Supply, Inc. (Pet.E.Writ ¶133; see pp. 148-159);

(17) Kutak/Dobbs secretly wrote orders, opinions, memoranda in Georgia Paneling Supply, Inc. for Judge Norton over said two and a half year period (Ibid);

(18) Kutak, Rock & Huie typed orders, opinions, memoranda in Georgia Paneling Supply, Inc. for Judge Norton for said two and a half year period (Pet.E.Writ ¶103);

(19) Kutak/Dobbs secretly discussed legal matters pending before and engaged in work sessions with Judge Norton ex parte in Georgia Paneling Supply, Inc. over said two and a half year period (Pet.E.Writ ¶133; see pp. 148-159);

(20) By March 6, 1978, Kutak/Dobbs had served as no-asset trustee in more than 200 cases pending before Judge Norton (Pet.E.Writ ¶54);

Which provided Judge Norton with -

(21) avoidance of duty to administer no-asset case himself (Pet.E.Writ ¶50);

(22) no reversals on appeal;

(23) preservation of good nationwide reputation;

D. And with respect to the following, vigorously contested, specific matters occurring in Georgia Paneling Supply, Inc. then pending before and purportedly decided by Judge Norton --

(24) KUTAK, ROCK & HUIE's client BARCLAYS/AETNA ("Kutak/Barclays/Aetna") 's motion for an award of costs against QUINAULT filed June 9, 1977, ordered on June 13, 1977, to be heard June 27, 1977, was granted (sic) on June 13, 1977 (Pet.E.Writ ¶78A, 79);

(25) Quinault's FRCP 60(b) motion, May 31, 1977, to set aside a Kutak, Rock &

Huie -- engineered settlement of the trustee's dispute with Kutak/Barclays/Aetna was ordered denied Dec. 20, 1977, with reasons furnished post hoc by Kutak/Dobbs in a secretly delegated, 40-page opinion of Jan. 5, 1978 (Pet.E.Writ ¶77, 92-95);

(26) Kutak/Barclays/Aetna's motion for an award of attorney's fees against Quinault filed Sept. 1, 1977, was granted by order June 7, 1978, upon memoranda of Sept. 11, 1978 and Nov. 14, 1978, all of which were secretly delegated by Judge Norton to Kutak/Dobbs (Pet.E.Writ ¶82, 110-112); and --

E. And with respect to the following additional facts:

(27) Kutak/Dobbs had on February 28, 1978 and he and Kutak, Rock & Huie partner R. WILLIAM IDE III ("Kutak/Ide") had on March 3, 1978 acted so as to conceal the

financial relationships between Judge Norton and Kutak, Rock & Huie (Pet.E.Writ ¶104-106);

(28) Judge Norton himself had on February 28, 1978 and March 6, 1978 acted so as to conceal the financial relationships between Himself acting nonjudicially or extrajudicially and Kutak, Rock & Huie (Ibid);

(30) Barclays/Aetna, Pennington and Freeman & Hawkins were knowing and willing beneficiaries of this concealment (Ibid).

2.

Whether "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of [the Court's] rules." Unites States v. Ohio Power Co., 353 U.S. 98, 99, 1 L.E.2d 683, 685 (1957). Cf. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.E.2d 103 (1981).

## QUESTION ADDRESSED TO SUPERVISORY POWER

Because Rule 404(b) of the Federal Rules of Evidence (providing that evidence of "extrinsic offenses" [United States v. Beechum, 582 F.2d 898 at 902 n.1 (old 5th Cir. en banc 1978 per Tjoflat, J.)] is admissible to prove intent or plan) is applicable to a Court of Appeals (Rule 1101[a]) especially where exercising original jurisdiction under the All-Writs Act (28 U.S.C. §1651), did not the Court of Appeals depart from the accepted and usual course of judicial proceedings in an order of June 16, 1983 denying Quinault's motion to supplement the petition for an extraordinary writ with subsequently developed evidence of an extrinsic offense relevant to the underlying issue of the intent and plan of the Bankruptcy Judge (in conjunction with Kutak, Rock & Huie)

to deceive the Court of Appeals and Quinault by concealment of prohibited financial relationships between them, where the evidence includes the bankruptcy judge's federally filed Financial Disclosure Report for calendar year 1982 of which the Court of Appeals should have taken judicial notice (upon the request contained below), whose late filing and disclosure of $12,000 of royalties from Callaghan & Company plus presumptions which this Court should draw (upon the request contained therein) suggest that the bankruptcy judge -- who has known since December 10, 1982 of Quinault's counsel's discovery -- (a) withheld filing until he saw whether Quinault would seek relief in the 11th Circuit and what proof it could produce, (b) determined to disclose no royalties if Quinault did not complain of the Callaghan-Norton

connection, which the bankruptcy judge had not disclosed in 1981 and earlier, but if Quinault did complain of the Callaghan-Norton connection, (c) disclose all payments as received in 1982, so as to indicate falsely that the Callaghan relationship commenced in 1982; and this evidence has a tendency to make the 1976-1980 intent or plan to deceive Quinault and this Court more probable than it would be without the evidence. Compare United States v. Satterfield, 644 F.2d 109 (old 5th Cir. Unit B [became 11th Cir.], 1981) with United States v. Pollard, 509 F.2d 601 (old 5th Cir. 1975).

## QUESTIONS PRESENTING CIRCUIT CONFLICT

Whether it is a violation of 28 U.S.C. § 455 for a judge's law clerk to be in the employ of an attorney representing

a litigant before the judge. Yes: Hall v. Small Business Admin., 695 F.2d 175 (new 5th Cir. 1983). No: In the Matterof Georgia Paneling Supply, Inc., 607 F.2d 117 (old 5th Cir. 1979), vacated 613 F.2d 137 (1979), reinstated 616 F.2d 893 (1980).

Where Judge Norton had signed an order awarding attorneys' fees, but no findings of fact or conclusions of law, and where the judgment debtor had taken an appeal, then under submission to, UNITED STATES DISTRICT JUDGE Richard C. Freeman ("Judge Freeman"), as appellate court, does an ex parte conference on the subject matter of the appeal between Judge Norton and Judge Freeman:

(a) mandate the appellate judge's disqualification, where he subsequently affirms the fee award without benefit of findings of fact (until reconsideration

sought) (Pet.E.Writ ¶118) and

(b) constitute a departure from the accepted and usual course of judicial proceedings. Yes: Matter of Cunningham, 57 N.Y.2d 270, 456 N.Y.S.2d 36, 442 N.E.2d 434 (1982). No: In the Matter of Georgia Paneling Supply, Inc., 607 F.2d 117 (old 5th Cir. 1979), vacated 613 F.2d 137 (1979), reinstated 616 F.2d 893 (1980).

## UNSETTLED FEDERAL QUESTION

Did Judge Norton have "any other interest that could be substantially affected by the outcome of the proceeding" under 28 U.S.C. §455(b)(4)?

## QUESTION OF EXTREME IMPORTANCE

A. Inasmuch as the Supreme Court of the United States has determined within the past year that so much of the Bankruptcy Reform Act of 1978 is unconstitutional as authorized bankruptcy judges to exercise the judicial power of the United States granted by Article III of the United States Constitution, (Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 73 L.E.2d 598, 102 S.Ct. 2858 (1982));

and

B. Inasmuch as the Congress of the United States is considering a bill to grant to bankruptcy judges life tenure and protection from diminution in compensation during tenure so as to be constitutionally capable of deciding legal issues presented to them by the

Bankruptcy Reform Act of 1978 requiring an exercise of the judicial power of the United States;

and

C. Inasmuch as the President of the United States desires to create several hundred new Article III judges assigned to handle bankruptcy matters to be filled with the present bankruptcy judges;

and

D. Inasmuch as the Chief Justice of the United States has publicly opposed legislation that would elevate bankruptcy judges to Article III status,

and

E. Inasmuch as a number of circuit judges, district judges and members of

the private bar of this nation also oppose elevating bankruptcy judges to Article III status;

Does not this Court as an Article III court have an obligation to the other two coordinate branches of Government -- (a) the Congress, (b) the President -- and to the public to grant a writ of certiorari or to vacate the denial of the timely petition for rehearing in this Court on January 12, 1981 (449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905) --

(1) to allow a full and public investigation of the workings of the United States Bankruptcy Court for the Northern District of Georgia;

(2) to test the operation of this United States Bankruptcy Court against (a) Fifth Amendment Due Process of Law, (b) 28 U.S.C. § 455, and (c) the Code of

Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States (April 5, 6, 1972);

(3) to inquire into whether the bankruptcy judge has knowingly violated 28 USCA App. 1 §301(c), the Ethics in Government Act of 1978.

## II.

## PARTIES RESPONDENT AND CORPORATE INFORMATION AND AFFILIATIONS

### A. PARTIES RESPONDENT.

Petitioner named the following as Respondents in the United States Court of Appeals: BARCLAYS AMERICAN/BUSINESS CREDIT, INC., as reported successor in interest to AETNA BUSINESS CREDIT, INC.; JOHN C. PENNINGTON, Former Trustee in Bankruptcy for GEORGIA PANELING SUPPLY, INC., Discharged Bankrupt; FREEMAN & HAWKINS; THE CITIZENS AND SOUTHERN NATIONAL BANK; and INTERNATIONAL PAPER COMPANY. Petitioner named former joint petitioners in the Supreme Court, THE FLINTKOTE COMPANY; ICG VISTA PETROLEUMS, INC. as Involuntary Petitioners/Deemed Respondents (Federal Rule of Appellate Procedure 21[c]). Petitioner did so by

analogy to Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U.S. 459, 70 L.Ed. 357, 46 S.Ct. 166 (1926). Petitioner deems them to be so designated herein.

B. PETITIONER.

Petitioner QUINAULT PACIFIC CORPORATION, a corporation organized under laws of the State of Washington, has no parent corporation although it is owned in part by an employees stock ownership trust; and QUINAULT may be deemed to have one affiliated corporation: South Sound Cedar, Inc., also a Washington corporation.

On January 3, 1983, QUINAULT filed a petition under Chapter 11 of the Bankruptcy Reform Act of 1978 (assigned

Case No. 83-00023). By order of the United States Bankruptcy Court for the Western District of Washington, February 14, 1983, QUINAULT was "authorized to employ" the undersigned counsel "for the specific purposes outlined in the Application" which states that QUINAULT "may have been denied an impartial hearing as a result of alleged impermissable business dealings between the bankruptcy judge and counsel in the then-pending bankruptcy of Georgia Paneling." (Pet.E.Writ ¶156-161, pp. 135-137)

III.

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | Questions Presented for Review | i |
| | A. Questions Addressed To Inherent Power | i |
| | B. Question Addressed To Supervisory Power | xi |
| | C. Questions Presenting Circuit Conflicts | xiii |
| | D. Unsettled Federal Question | xv |
| | E. Question of Extreme Importance | xvi |
| II. | Corporate Information and Affiliations | xx |
| III. | Table of Contents | xxii |
| IV. | Table of Authorities | xxv |
| V. | References To Opinions And Orders In Courts Below | 1 |
| VI. | Grounds On Which Jurisdiction of This Court Is Invoked | 3 |
| VII. | Constitutional Provisions, Statutes Which The Case Involves | 5 |
| VIII. | Statement of the Case | 6 |
| | A. Georgia Paneling Supply, Inc. ("GPS") | 6 |
| | B. The Bankruptcy | 6 |
| | C. Pennington v.Aetna | 8 |
| | D. Judicial Methology | 9 |
| | E. Publishing Enterprise | 11 |
| | F. Judicial Misconduct | 15 |

VIII. Statement of the Case (Continued)
G. Discovery of Ghost-Writing of Judicial Opinions and Ex Parte Conferences on Appeal . 18
H. Quandary in Old 5th Circuit . . . . . 20
I. 1980 Cert. Petitions. . 22
J. Publicity Debilitates District Judge. . . . . 23
K. Termination of Pennington v. Aetna. . . 24
L. Discovery of Publishing Enterprise. . . . . 25
M. Petition for Extraordinary Writ. . . 26
N. Judge Norton's Belated Disclosure of Receipt of $12,000 from Publisher 26

IX. Concealment By Opposing Party Constitutes Fraud on Court. . .28

X. A Judge May Not Have An Interest In The Outcome Of The Case. . . . . 36
A. Said Interest Is A Deprivation of Due Process. . . . . 36
B. An Interest In The Outcome Is A Violation of 28 U.S.C. §455(b)(4) 42
C. Application of Law To Fact. . . . . 47

XI. A Judge May Not Have A Bias For A Party Or A Prejudice Against A Party In A Case Before Him. . . 54

XII. Conclusion And Argument On The One Question Of Exceptional Importance. . . 60

XIII. Certificate of Service. . 66

APPENDIX

I. Order, June 2, 1983 . . . A-1

II. Order, June 13, 1983. . . A-2

III. Order, June 16, 1983. . . A-3

IV. Order, July 28, 1983. . . A-4

IV.

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Berger v. United States, 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1922) | 56 |
| Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1981 en banc) | 58 |
| Chapman v. California, 386 U.S. 18, 17 L.E.2d 705, 87 S.Ct. 824 (1966) | 55 |
| Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 21 L.E.2d 301, 89 S.Ct. 337 (1968) | i, 35, 39 |
| Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975) | 57 |
| Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.E.2d 103, 101 S.Ct. 2424 (1981) | x |
| Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983) | xiii, 44 |
| Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 88 L.ed. 1250, 64 S.Ct. 997 (1944) | ii, 28 |
| Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U.S. 459, 70 L.Ed. 357, 46 S.Ct. 166 (1926) | xxi |

In the Matter of Cunningham,
57 N.Y.2d 270, 456 N.Y.S.2d
36, 442 N.E.2d 434 (1982). . . . . .xv

In the Matter of Georgia Paneling
Supply, Inc. (Case No. 79-1076):
616 F.2d 893 (5th Cir. 1980),
reinstating 607 F.2d 117 (1979),
vacated 613 F.2d 137 (1979),
resulting from petition for appeal
allowed at 588 F.2d 93 (1978),
vacating 581 F.2d 520
(1978). . . . . xiv, xv, 1, 20

In the Matter of Georgia Paneling
Supply, Inc. (Case No. 78-3370):
617 F.2d 293 (5th Cir. 1980, Table),
reinstating 607 F.2d 1004 (1979),
vacated 613 F.2d 312 (1979), rehear-
ing denied 618 F.2d 1389 (1980) . . 1, 21

In the Matter of Georgia Paneling
Supply, Inc., Bankrupt,
Bankruptcy No. B74-1628A,
N.D.GA.,
June 24, 1974 . . . . . vi-viii, 7, 17, 47

In re Murchison, 349 U.S. 133,
99 L.Ed. 942, 75 S.Ct. 623
(1955(. . . . . 40, 54

In the Matter of Quinault Pacific
Corp., Debtor, No. 83-00023, W.D.
WASH., January 3, 1983. . . . . .xx

In re Virginia Electric Co.,
539 F.2d 357 (4th Cir. 1976). . . . . 45

Kinnear-Weed Corp. v. Humble Oil
& Refining Co., 403 F.2d 437
(5th Cir. 1968). . . . . 31

Nicodemus v.Chrysler Corp.,
596 F.2d 152 (6th Cir. 1979) . . . . . .57

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 73 L.E.2d 598, 102 S.Ct. 2858 (1982). . . . . .xvi, 63, 64

Parrish v. Board of Commissioners of the Alabama State Bar, 524 F.2d 98 (5th Cir. 1975 en banc). . . . . 57

Pennington, Trustee for Georgia Paneling Supply, Inc. v. Aetna Business Credit, Inc., N.D.GA., Civil Action No. C75-1540A, August 5, 1975 . . . . . .8, 18, 24

Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980) . . . . . .43, 60

Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976) . . . . . 58

Quinault Pacific Corp. v. Aetna Business Credit, Inc., 448 U.S. 915, 65 L.E.2d 1178, 101 S.Ct. 35 (1980), 449 U.S.954, 66 L.E.2d 218, 101 S.Ct. 360 (1980); 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981). . . . i, 2, 4, 22, 23, 63

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). . . iv

Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927). . . . . 36-38, 54-55

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978 en banc). . xi

United States v. Grinnell Corp., 384 U.S. 563, 16 L.E.2d 778, 86 S.Ct. 1698 (1966). . . . . 56

United States v. Ohio Power Co., 353 U.S. 98, 1 L.E.2d 683, 77 S.Ct. 652 (1957). . . . . x

United States v. Pollard, 509 F.2d 601 (5th Cir. 1075) . . . . . xii

United States v. Satterfield, 644 F.2d 109 (5th Cir. 1981) . . . . xii

United States v. Will, 449 U.S. 200, 66 L.E.2d 392, 101 S.Ct. 471 (1980). . . . . 43

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946). . . . . 30

Ward v. Village of Monroeville, 409 U.S. 57, 34 L.E.2d 267, 93 S.Ct. 80 (1972). . . . . 38-39

Statutes

28 U.S.C. § 144. . . . . .57

28 U.S.C. § 452. . . . . 4

28 U.S.C. § 455. . . . . .xiii, 43
455 (a). . . . . 60
455 (b) (4). . . . . xv, 42
455 (d). . . . . 42

28 U.S.C. § 1254 (1) . . . . . 4

28 U.S.C. § 1651. . . . . .xi, 4

28 U.S.C. § 2106. . . . . 4

Bankruptcy Act of 1898,
as amended, Chapter XII . . . . . 11

Bankruptcy Reform Act of
1978 (11 U.S.C. § 301 et seq.). . . . xvi

28 U.S.C.A. App. 1 § 301 (c)
("Ethics in Government Act"). . . . . xix

United States
Constitution

Article I. . . . . 63

Article III. . . . . xvi-xviii

Fifth Amendment . . . . . .xviii, 36

Other

THE ATLANTA CONSTITUTION, October
17, 1980, page one. . . . . 23

Canon of Judicial Ethics
33rd Canon. . . . . .44

Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States, April 5, 6, 1973 . . . . . xviii

The Federalist No. 79 (1818). . . . . 49

Federal Rule of Appellate Procedure 27 (b) . . . . . ii, 37

Federal Rules of Civil Procedure 60 (b). . . . . viii, 1
60 (b) (3). . . . . 48

Federal Rule of Evidence
404 (b) . . xi
1101 (a). . . . . xi

Magna Carta (A.D. 1215)
Article 39. . . . . 36

Judge Norton's books, and treatises; Disclosure

Annual Survey of Bankruptcy Law, copyrighted 1976 annually, by Callaghan and Company. . . . . 14

Evidence in Federal Bankruptcy Trials, copyrighted 1978, by The Harrison Company, with a co-author. . . . . .12,13

Real Property Arrangements Under Chapter XII, Federal Bankruptcy Act, copyrighted October 19, 1977, The Harrison Company. i, 12, 13, 17, 18, 20, 47, 50, 52

1979 Supplement to Real Property Arrangements, copyrighted (sic) 1979. . . . . iii, 12, 13, 17, 18, 20, 52

Norton Bankruptcy Law And Practice copyrighted September 2, 1981, by Callaghan and Company . . . iii, 14, 16, 18, 27, 51, 52

Financial Disclosure Reports, filed by Judge Norton, 1978 to 1982. . . . . iii, xii, 4

## V. REFERENCES TO OPINIONS AND ORDERS IN COURTS BELOW.

The original cases in the United States Court of Appeals for the (old) Fifth Circuit to which the instant matter appertains were two: Case No. 79-1076, sometimes referred to herein as "the FRCP 60(b) case", is reported at In the Matter of Georgia Paneling Supply, Inc., 616 F.2d 893 (1980), reinstating (sic) 607 F.2d 117 (1979), vacated 613 F.2d 137 (1979), resulting from petition for appeal allowed at 588 F.2d 93 (1978), vacating 581 F.2d 520 (1978).

Case No. 78-3370, sometimes referred to herein as "the fee award case", is unreported and noted at In the Matter of Georgia Paneling Supply, Inc., 617 F.2d 293 (1980, Table), reinstating (sic) 607 F.2d 1004 (1979, Table), vacated 613 F.2d 312 (1979, Table), rehearing denied 618 F.2d 1389 (1980, Table).

Petitioner QUINAULT PACIFIC CORPORATION with three other parties filed a petition for writ of certiorari in the FRCP 60(b) case which this Court assigned Case No. 80-344 and denied sub nom. Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, 66 L.E.2d 218, 101 S.Ct. 360 (1980), and also denied a petition for rehearing. 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981).

Petitioner and four other parties filed an application for a stay of mandate in the fee award case which this Court assigned No. A-1169 and denied sub nom. Quinault Pacific Corp. v. Aetna Business Credit, Inc., 448 U.S. 915, 65 L.E.2d 1178, 101 S.Ct. 35 (1980). Said parties also filed a petition for writ of certiorari in the fee award case which this Court assigned Case No. 80-345 and denied, 449 U.S. 954, 66 L.E.2d 218, 101

S.Ct. 360 (1980), and denied a petition for rehearing, 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981).

None of the recent proceedings in the United States Court of Appeals for the Eleventh Circuit, as successor to the old Fifth Circuit, have been reported or noted.

## VI. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) A petition for an extraordinary writ was filed May 20, 1983 in the United States Court of Appeals of the Eleventh Circuit as successor to the old Fifth Circuit, assigned Case No. 83-8357, and denied in a one-sentence unreported order of June 2, 1983 (App. at A-1). Respondent Barclays American/Business Credit, Inc. ("Barclays/Aetna") filed a motion for an award of attorney's fee

which was denied in a one-sentence unreported order of June 13, 1983 (App. at A-2). Petitioner filed a motion for an extension of time to file a petition for rehearing en banc in order to supplement the petition for extraordinary writ with information derived from the bankruptcy judge's late filed 1982 Financial Disclosure Report. This motion was denied in an unreported one-sentence order of June 16, 1983 (App. at A-3).

(ii) The petition for rehearing en banc was denied in an unreported order of July 28, 1983 (App. at A-4).

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari are as follows: 28 U.S.C. § 1254(1); 28 U.S.C. § 452; 28 U.S.C. § 1651; 28 U.S.C. § 2106.

## VII. CONSTITUTIONAL PROVISIONS, STATUTES WHICH THE CASE INVOLVES

Sources are referenced at pages 171-175 in "Part Three: Constitutional Provisions, Statutes, Regulations Involved", located Petitioners' Joint Appendix filed September 2, 1980 in respect of Quinault Pacific Corporation v. Aetna Business Credit, Inc., Case No. 80-344 and 80-345,

to which petitioner herein, which was a petitioner therein, respectfully calls attention.

## VIII. STATEMENT OF THE CASE.

### A. Georgia Paneling Supply ("GPS")

Quinault sold cedar lumber on credit to GPS in 1973 at a time when Barclays/Aetna was making advances to GPS secured by a guaranty in turn secured by accounts receivable and inventory. GPS had become insolvent and Barclays/Aetna hid this fact in order to induce Quinault and other wholesale suppliers to sell goods which Barclays/Aetna could seize, liquidate and use to pay off the bad loans. Barclays/Aetna discovered the insolvency after GPS's lender, the C&S Bank, had discovered it, and the two companies eventually joined hands in each company's ongoing effort to defraud the suppliers (Pet.E.Writ ¶27-38).

### B. The Bankruptcy.

Quinault got wind of the fraud in

the early summer of 1974, and together with several other Pacific Northwest suppliers filed an involuntary petition in the United States Bankruptcy Court for the Northern District of Georgia on June 24, 1974. The case was assigned to Judge Norton who on July 29, 1974 declared GPS to be a bankrupt (Pet.E.Writ ¶39-40).

Quinault strove mightily to uncover the Barclays/Aetna-C&S fraud and to this end had Judge Norton appoint John C. Pennington as receiver and trustee in bankruptcy (Pet.E.Writ ¶8). Mr. Pennington was one of Judge Norton's four no-asset trustees whom he appointed to handle all such cases (Pet.E.Writ ¶50). He promised that he would appoint them to lucrative cases in return for such services (Pet.E.Writ ¶52). Quinault also urged Mr. Pennington to file a plenary action for fraud on the bankrupt which was accomplished in state court on July 9, 1975. The defendants

removed it to the United States District Court for the Northern District of Georgia (Civil Action No. C75-1540A) as Pennington v. Aetna Business Credit, Inc. and The C&S Bank of North Fulton ("Pennington v. Aetna") (Pet.E.Writ ¶48-49).

C. Pennington v. Aetna.

The plenary action was assigned to UNITED STATES DISTRICT JUDGE Richard C. Freeman ("Judge Freeman") who later stated several times on the record that he detested bankruptcy law (Pet.E.Writ ¶74-75). Nevertheless, he allowed Quinault and several other unsecured creditors to intervene in the action when it appeared that the trustee was uninterested. (Order, September 30, 1976.) Also, Judge Freeman denied motions for summary judgment, motions for reconsideration, motions to limit issues,

etc. filed by the defendants and ultimately scheduled a jury trial in October, 1981.

E. Judicial Methodology.

The trustee's lack of interest in the case resulted in a $350 settlement with Barclays/Aetna which came on for hearing on May 18, 1976. At the hearing Barclays/Aetna was represented by Kutak/Dobbs, who was another of Judge Norton's four no-asset trustees. By March 6, 1978, Kutak/Dobbs had so assisted Judge Norton in more than 200 cases (Pet.E.Writ ¶54).

Judge Norton reserved decision on the application to settle at the end of the hearing, but immediately thereafter called in Kutak/Dobbs and the trustee, discussed the case with them ex parte, decided the matter in their favor,

assigned to Dobbs the task of writing an opinion, thereafter discussed it with him, ultimately publishing it as the judge's own work on June 17, 1976 (Pet.E.Writ ¶60A).

This pattern was continued without interruption throughout the bankruptcy proceedings until the last order was entered by Judge Norton on November 14, 1978 (Pet.E.Writ passim).

Quinault's counsel learned on June 4, 1976, that Judge Norton had arrangements with several Atlanta law firms where private lawyers would be secretly asked to decide cases for Judge Norton, write memoranda and decisions which would be published as the judge's own work (Pet.E.Writ ¶56-57).

Along this time Judge Norton made an arrangement with his alma mater, Emory

University Law School, whereby law students would become his law clerks and earn credit toward their law degree. Soon, though, Judge Norton had these students working on books he wanted published (Pet.E.Writ ¶64-65).

E. Publishing Enterprise.

The 1973-1975 recession hit the Atlanta real estate market with special severity, and lawyers rediscovered the cram-down provisions of Chapter XII of the Bankruptcy Act of 1898, as amended. However, there were few well reasoned judicial opinions or law review articles on the subject (Pet.E.Writ ¶66-68).

At the same time, the organized bar was becoming dissatisfied with the publisher of the official judicial opinions of the Georgia appellate courts and the Georgia Code Annotated for

excessive expense and poor publishing decisions. The matter became serious and a committe was appointed which in time led to special legislation and litigation whereby the state work was re-contracted out to an out-of-state publisher. Accordingly, in 1976, The Harrison Company was desperately looking for other titles to publish (Pet.E.Writ ¶69).

A marriage occurred between Judge Norton and The Harrison Company to publish Real Property Arrangements underChapter XII, Federal Bankruptcy Act ("Chapter XII book"), copyrighted October 19, 1977, a 1979 Supplement, prepared by mid-1978, and Evidence in Federal Bankruptcy Trials ("Evidence book"), published in 1978 (Pet.E.Writ ¶70-71).

A United States Bankruptcy Judge has many duties to accomplish, both administrative and judicial. It is a

full time job. To author these books Judge Norton needed assistance. He got it from the law students at Emory Law School and from the private Atlanta Bar. Specifically, he got Kutak/Dobbs, to write a major portion of the Chapter XII book, the 1979 Supplement, and another bankruptcy judge to assist with the Evidence book. The Emory law students and the four no-asset trustees served as editors, proofreaders (Pet.E.Writ ¶72).

1978 also proved to the year that a Bankruptcy Code was finally enacted. The matter had been under active study for more than ten years. By 1977 Judge Norton had fixed his mind on writing the definitive bankruptcy treatise. The passage of the 1978 Act would be the occasion. He commenced preparation of an outline in 1977 and began to recruit Emory law students and members of the private Atlanta Bar to help. Soon,

however, the publisher of another Norton work, Annual Survey of Bankruptcy Law, prepared by the Emory law students under Judge Norton's name, agreed to publish the treatise and suggested an all star cast of United States Bankruptcy Judges and leading bankruptcy lawyers across the United States. The bulk of Judge Norton's time from early 1978 to September, 1981 was devoted to the publication by Callaghan & Company of Norton Bankruptcy Law and Practice, copyrighted September 2, 1981 (Pet.E.Writ ¶97-98).

The "Introduction" authored by Judge Norton prior to May 22, 1981, states that he had been working on the treatise "for the past three years or so". He describes his regard for the contributing editors and consultants as "unbounded" (Pet.E.Writ at pp. 85-87). The author pages (Id. at pp. 80, 83) and the

Certificate of the United States Copyright Office (Id. at 92) disclose that a contributing editor was Kutak/Dixon and a consultant was Kutak, Rock & Huie lawyer Timothy J. Kincaid ("Kutak/Kincaid").

G. Judicial Misconduct.

On February 28, 1978, Judge Norton in conjunction with Kutak/Dobbs unreasonably restricted Quinault's discovery of Dobbs, Kutak's Ide so as to conceal the publishing ventures between Aetna's lawyers and Judge Norton (Pet.E.Writ ¶104).

On March 6, 1978, Judge Norton prevaricated when he denied that Kutak's Dobbs had secretly ghost-written the 40-page opinion published January 5, 1978. (He also misrepresented from the bench that he had not eaten breakfast

with the trustee in bankruptcy at 7:00 a.m. on September 20, 1977 prior to a hearing in the Georgia Paneling Supply, Inc., bankruptcy.) (Pet.E.Writ ¶106).

Despite Quinault's charges of judicial misconduct to Judge Norton's face on the record he denied such and wilfully failed to disclose thecontractual relationships which he had with Kutak/Dixon whereunder Judge Norton promised to pay Kutak/Dixon a portion of the royalties which Judge Norton himself would earn from Callaghan & Company. For 1982, Judge Norton disclosed $ 12,000.00 of royalties from Callaghan & Company, or one-fourth his judicial salary (Pet.Rehearing at A-1, 4th unnumbered page). To a second contributing editor of Volume 2 of Norton Bankruptcy Law and Practice Judge Norton has actually paid royalties (Pet.E.Writ ¶161B, 162A).

Moreover, Judge Norton failed to disclose that Kutak/Dobbs had written a portion of the Chapter XII and would write a portion of the 1979 Supplement (Pet.E.Writ ¶114).

Despite District Judge Freeman's order that Judge Norton enter findings of fact and conclusions of law on the fee award, Judge Norton delegated this job to Kutak/Dobbs who ghost-wrote secretly a 37-page memorandum on September 11, 1978 and a seven-page memorandum on November 14, 1978 (Pet.E.Writ ¶121-122, 125).

On June 7, 1978, Judge Norton entered a $ 5,146.30 fee award in favor of Kutak/Barclays/Aetna, knowing the money would indirectly benefit Kutak. The money was compensate Kutak/Dobbs for serving as law clerk to Judge Norton in the Georgia Paneling Supply case for more than two years, and for writing the

Chapter XII book and 1979 Supplement for the judge. Of course, this would be poor pay. So the judge allowed Kutak/Dobbs to write the opinion as he saw fit in order to lend factual support for Barclays/Aetna's $600,000 of counter-claims which Aetna had interposed against Quinault in Pennington v. Aetna (Pet.E.Writ ¶110-112).

H. Discovery of Ghost-Writing and Ex Parte Conferences between Judge Norton and Judge Freeman While Case on Appeal From One To Other

The $350 settlement was approved by Judge Norton. An appeal was taken to District Court and assigned to Judge Freeman, who affirmed. A FRCP 60(b) motion was filed, resulting in a remand to Judge Norton to conduct an evidentiary hearing. During the proceedings before Judge Norton from late August to early January, 1978, Kutak/Dobbs was writing the Chapter XII book and Kutak/Dixon was assisting with Norton Bankruptcy Law and

Practice. Kutak/Dobbs was writingJudge Norton's orders and opinions in the GPS case (Pet.E.Writ passim).

Proof of ghost-writing was obtained on February 28, 1978. Judge Norton apparently feared discovery. He previously promised to enter a fee award for Kutak/Barclays/Aetna. Upon Quinault's making known facts in open court, the judge retaliated by entering a particularly large $36,331.30 fee award against Quinault. Having expressly ruling that he would not enter a fee award against Quinault's counsel, the judge made him jointly and severally liable (Pet.E.Writ ¶105).

On February 28, 1978, the FRCP 60(b) case was on appeal from Judge Norton to Judge Freeman. But Judge Freeman was not interested and ignored the issue in affirming the settlement. While the fee award was on appeal from Judge Norton to

Judge Freeman and before Judge Norton had entered findings of fact and conclusions of law, Judge Norton ex parte met with Judge Freeman and discussed the case. After the conference Judge Freeman entered the order of July 25, 1978. There is no motion seeking permission to open the depositions. The order was drafted by Kutak's Dobbs during the time he was drafting the 1979 Supplement for the Chapter XII book. Dobbs may have been present at the conference (Pet.E.Writ ¶118).

H. Quandary in Old Fifth Circuit.

A panel of the Court of Appeals first denied Quinault's petition for a discretionary appeal, stating that "The occurrence of ex parte conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion." 581 F.2d 520,

522 (1978). But then on petition for rehearing, the original panel opinion was vacated "Because of the allegations of judicial misconduct . . . ." 588 F.2d 93 (1978). The matter came on for hearing before a second panel and Judge Freeman's affirmance was affirmed. 607 F.2d 117 (1979). A petition for rehearing was again filed, and was again granted, and the previous panel opinion was vacated. 613 F.2d 137 (1979). Oral argument was had before a third panel which reinstated the second panel's vacated opinion with these closing remarks: "The appellee's motion for assessment of attorney fees against appellants for frivolous appeal is denied." 616 F.2d 893 (1980). An unnoted petition for rehearing was denied.

The Old Fifth Circuit also had problems with the fee award. It was affirmed. 607 F.2d 1004 (1979, Table). A petition for rehearing was filed,

granted, and the original paenl opinion was vacated. 613 F.2d 312 (1979, Table). On rehearing before another panel, the earlier affirmance was reinstated. 617 F.2d 293 (1980, Table). A petition for rehearing was denied. 618 F.2d 1389 (1980, Table).

I. 1980 Cert. to Supreme Court.

Both Cases were the subject of cert. petitions in this Court where they were assigned Cases No. 80-344, 80-345. The cert. petition in No. 80-344 stated on page 28: "Although no pecuniary interest can be proven, petitioners' proof of other facts -- taken in connection with admissions in judico -- should suffice to establish mandatory disqualification." To repeat, Quinault did not previously claim that Judge Norton had a financial interest in the GPS case.

Quinault sought an application for a stay in the fee award case, which was denied. 448 U.S. 915, 65 L.E.2d 1178, 101 S.Ct. 35 (1980). Certiorari was denied in both cases on November 3, 1980. 449 U.S. 954, 66 L.E.2d 218, 101 S.Ct. 360 (1980). Petition for rehearing was denied in both cases on January 12, 1981. 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981).

K. Publicity Debilitates Judge Freeman.

Six weeks after Quinault's cert. petitions were filed in the Supreme Court the October 17, 1980 morning edition of THE ATLANTA CONSTITUTION carried a front-page newspaper story by a Pulitizer-prize-winning reporter entitled, "Two Atlanta U. S. Judges Accused of Legal 'Misconduct'". Other newspapers and radio stations carried the story (Pet.E.Writ ¶435, pp. 298-300).

Before noon that day Judge Freeman called for the briefs. A year and four days later, he told Quinault, after it had settled Pennington v. Aetna, that out-of-town house guests of his had seen the article that morning (Pet.E.Writ ¶136).

Throughout this period Judge Freeman was very ill, undergoing several medical operations and missing ten or eleven weeks from his judicial duties. The adverse publicity preyed on his mind and in Quinault's president's opinion emotionally and mentally disturbed him (Pet.E.Writ at p. 68, 173, ¶144).

K. Termination of Pennington v. Aetna.

Judge Freeman's prejudice against Quinault for merely reporting the truth resulted in great fear of an astronomical fee award in Aetna's and C&S's favor. Therefore, Quinault settled the suit for

zero dollars. The release specifically excludes matters not alleged in pleadings and briefs. As pointed out previously, no allegation was ever made that Kutak, Rock & Huie was engaged in a publishing enterprise with Judge Norton (Pet.E.Writ ¶ 144, 146-146A, 150; pp. 138-141).

N. Discovery of Publishing Enterprise

In November, 1982, Quinault's former counsel learned of the publishing enterprise. He told Quinault on December10, 1982. Quinault filed a Chapter 11 petition in the United States Bankruptcy Court for the Western District of Washington on January 3, 1983. By court order dated February 10, 1983, Quinault was "authorized to employ" former cousel "for the specific puposes outlined in the Application" which states that Quinault "may have been denied ar

impartial hearing as a result of alleged impermissable business dealings between the bankruptcy judge and counsel in the then-pending bankruptcy of Georgia Paneling." (Pet.E.Writ ¶154-161; pp. at 135-137).

M. Petition for Extraordinary Writ.

After making demand on Quinault's former joint venture partners in the litigation, Quinault filed a petition for an extraordinary writ on May 20, 1983 inthe United States Court of Appeals for the Eleventh Circuit where the matter was treated as an emergency motion and assigned No. 83-8357.

O. Judge Norton's Belated Disclosure That He Had Received $12,000.00 From Callaghan & Company.

The petition for extraordinary writ was mailed immediately by United States Registered Mail to Judge Norton. On May

23, 1983, his secretary signed the return receipt, which Quinault's counsel received May 24. Two days later, the Judicial Conference of the United States received Judge Norton's 1982 Financial Disclosure Report, which had been due on May 15, 1983. Disclosure that Judge Norton had received all $12,000 in 1982 did not square with information fromCallaghan that a formal contract had been concluded in April, 1979 and from the clerk's office that Judge Norton had flown all around the country for conferences on his Norton Bankruptcy Law and Practice (Pet.E.Writ passim).

## IX. CONCEALMENT BY OPPOSING COUNSEL CONSTITUTES ACTUAL FRAUD ON THIS COURT

Petitioner has not discovered a case in which the Supreme Court concluded that an actual fraud had been perpetrated on it. But petitioner has found two cases in which the Court held that an actual fraud had been perpetrated on a United States Court of Appeals.

In Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 L.Ed. 997, 64 S.Ct. 997 (1944), the United States Circuit Court of Appeals for the Third Circuit in a prior appeal in a patent infringement case mentioned a published article describing a patented process as an improvement over existing technology, in the course of reversing the trial court and upholding the patent. Years thereafter, the circuit court was informed by a petition for an

extraordinary writ in the nature of a bill of review that the patent holder through its counsel had written the article and paid a labor official to state he was the author. The circuit court ruled that the article was not a ratio decidendi of the opinion and denied the petition. The court also faulted the petitioner for laches.

The Supreme Court reversed in an opinion by Justice Black, finding the mere possibility of influence was sufficient to grant the writ. The court instructed the court of appeals to remand to the district court with direction to dismiss the infringement action and rule the patent invalid. The latter was to punish the patent holder for propagating the fraudulent article even if true.

The Supreme Court noted approvingly that the petitioner had attached a copy

of its proposed complaint, although its filing was not necessary. The court clearly approved the filing of affidavits in the court of appeals in support of the petition. Despite a strong dissent by Justice Roberts and concurred in by three others, the court approved a review in and by the appeals court where the facts are conclusive. This position was followed a few years later by the entire court, through Justice Frankfurter, in Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946), where attorneys (for persons previously settling a case, a portion of which had reached the Supreme Court) brought to the attention of the Third Circuit a bribery of a circuit judge.

The old Fifth Circuit has stated that it is unequipped to have any type of factual investigation conducted before

it. Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F.2d 437 (5th Cir. 1968).

Quinault has not asserted that Judge Norton received a bribe, but it has stated that he issued from his chambers numerous orders and opinions that were written by a party's attorneys with whom the judge had private financial and business dealings. Clearly, the old Fifth Circuit relied on the legitimacy of these orders and opinions. But neither that court nor this was told by Judge Norton or by Kutak Rock & Huie of their private financial and business dealings. This Court has spoken on such nondisclosure in a less compelling case, to wit: Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 21 L.E.2d 301, 89 S.Ct. 337 (1968):

A dispute was being arbitrated before a board of three arbitrators. A third arbitrator had been selected by the two arbitrators selected by each party. Unbeknownest to the petitioner, the third arbitrator had furnished engineering consulting services to the respondent, a prime contractor, who was a party to the arbitration. The relationship between the third arbitrator and the prime contractor was sporadic, there had been no dealings between them for about a year immediately preceding the arbitration, the patronage was repeated and significant, and the prime contractor had paid the arbitrator about $12,000 over a period of four or five years. "[A]nd the relationship even went so far as to include the rendering of services on the very projects involved in this lawsuit." 21 L.E.2d 303.

"An arbitration was held, but the facts concerning the close business connections . . . were unknown to petitioner and were never revealed to it by this arbitrator, by the prime contractor, or by anyone alse until after an award had been made." 21 L.E.2d 303.

The Court continued:

> "We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge." *** For in Tumey the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge *** [I]n the case of courts this is a constitutional principle." 21 L.E.2d 304. [First emphasis added.]

The Court cited to the 33rd Canon of Judicial Ethics which provides:

> "33. Social Relations.
> ". . . [A judge] should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may

reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct."

And the Court stated:

"This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 21 L.E.2d 305.

Justice Fortas dissented on the basis that "The Court applies to this process rules applicable to judges . . . ." 21 L.E.2d 308. Three justices joined him.

The majority opinion concluded:

"We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 21 L.E.2d 305.

The Commonwealth case was cited and discussed in petitioner's cert. petition in Case No. 80-344 (Pet.E.Writ at p. 218) at pages 17, 21, 28. On the latter page (28), petitioner stated:

> "Although no pecuniary interest can be proven, petitioners' proof of other facts -- taken in connection with admissions in judico -- should suffice to establish mandatory disqualification." (Pet.E.Writ at p. 239.)

Certainly, Aetna's counsel, Kutak, Rock & Huie should have disclosed the private financial and business dealings with Judge Norton when they filed their Brief of Respondents a month later. Too, they should have responded to the charges in the Petition for an Extraordinary Writ when they filed a motion under Federal Rules of Appellate Procedure (27 [b]).

## ARGUMENT

### X. A JUDGE MAY NOT HAVE AN INTEREST IN THE OUTCOME OF A CASE

### A. SAID INTEREST IS A DEPRIVATION OF FIFTH AMENDMENT DUE PROCESS.

Magna Carta (A.D. 1215) provides in Article 39, as follows:

> "To no one will we sell, to no one will we refuse or delay, right or justice."

This is embodied in the assurance of Due Process of Law in the Fifth Amendment to the United States Constitution:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

In 1927, this Court first considered a case in which a judge had an interest in the outcome. Examined in Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437, were Ohio statutes which authorized the mayor of the village of North College Hill to try persons

apprehended for violation of prohibition laws. Upon conviction the mayor was authorized to "receive or retain the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases." 71 L.Ed. 753. Without conviction, the mayor received nothing. Tumey was convicted. The costs imposed were $12 paid directly to the mayor. In a seven month period the mayor made almost $700.

> "But the pecuniary interest of the mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here." 71 L.Ed. 758.

The Court found as a second ground the mayor's "official motive to convict and to graduate the fine to help the financial needs of the village."

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the

trial of defendants charged with crimes before him." 71 L.Ed. 759.

In Ward v. Village of Monroeville, 409 U.S. 57, 34 L.E.2d 267, 93 S.Ct. 80 (1972), the Court examined Ohio law which authorized a mayor to sit as his own court, to try traffic offenses and to fine an accused $50 for each offense. The mayor had wide executive responsibilities for revenue production. He accounted annually to the village council respecting village finances. From 30 to 50 per cent of village income was derived from the fines, forfeitures, costs and fees imposed by him in his court. This Court observed:

> "The fact that the mayor [in Tumey v. Ohio] shared directly in the fees and costs did not define the limits of the principle." *** [T]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge [1] to forget the burden of proof required to convict the defendant, or which might lead him [2] not to hold the balance nice, clear and true between the State and

> the accused . . . .'" *** Plainly that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." 34 L.E.2d 271. [Emphasis added.]

Justice White dissented because the mayor "had no direct financial stake in its outcome." finding the presumption of regularity to be sufficient and "leav[ing] the due process matter to be decided on a case-by-case basis. . . ." 34 L.E.2d 272.

The above are criminal cases or akin thereto. There has been relief in a civil case which was not cited in Ward v. Monroeville, to wit:

> "At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 21 L.E.2d 301, 305, 89 S.Ct. 337 (1968).

Each of the above cases disclosed money being paid or having been paid directly or indirectly to the tribunal. By contrast In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), the "one-man judge-grand jury" received nothing, but still had an interest in the litigation. Under Michigan law any judge of record could compel witnesses to appear before him in secret to testify about suspected crimes. Murchison was called to so testify. The judge concluded that he had committed perjury, charged him, ordered him to appear and show cause why he should not be punished for criminal contempt. The Judge then tried him in open court, convicted and sentenced him for contempt. The Court first observed:

> "A fair trial in a fair tribunal is a basic requirement of due process. *** To this end no man can be a judge in his own case and no man is permitted to try cases

> where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered." [Emphasis added.] 99 L.Ed. 946.

The Court found an interest in the outcome from (a) the presumed existence of a carryover zeal from the grand jury to the tribunal and (b) personal knowledge of facts disclosed in the grand jury room.

> "There were no pubic witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge." 99 L.Ed. 947.

The Court emphasized the absence of cross-examination of the judge as to his personal knowledge. Three justices dissented from disqualifying a judge "when his sole interest, as shown by this record, is the maintenance of order and decorum in the investigation of crime -- an intest which he shares in common with all judges who punish for contempt." 99 L.Ed. 949.

B. AN INTEREST IN THE OUTCOME OF THE CASE IN VIOLATION OF 28 U.S.C. §455(b)(4)

All of the preceding cases are from this Court and all ajudge the impartiality of the tribunal under Due Process of Law. Judge Norton's interest also violates 28 U.S.C. §455(b)(4):

> (b) [Any referee in bankruptcy, amended effective November 6, 1978, to refer to any bankruptcy judge"] shall also disqualify himself in the following circumstances:
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceedings; ***

28 U.S.C. §455(d) defines "financial interest" as --

> "[O]wnership of a legal or equitable interest, however small, or a relationship as director, adviser, or toher active participant in the affairs of a party [with certain exceptions, not here relevant]."

This Court presumed that 28 U.S.C. §455 is constitutional in United States v. Will, 449 U.S. 200, 66 L.E.2d 392, 101 S.Ct. 471 (1980), the only case to examine this statute. Of relevance to Judge Norton's interest is the quote therein from The Federalist No. 79, p. 491 (1818) (emphasis deleted):

> "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." 66 L.E.2d 408.

Several courts of appeals have passed upon 28 U.S.C. §455. In Potashnick v. Port City Construction Co., 609 F.2d 1101 (1980), the old Fifth Circuit reversed an order of a second judge that District Judge Hand was not disqualified by reason of the fact that prior to commencement of

pending litigation Judge Hand and Port City's trial counsel, Paul Brock, had jointly invested in real estate which, during the course of pending litigation, had itself become the subject of litigation for which Brock undertook to seek a procedural delay in the extrajudicial case on behalf of Judge Hand and others.

In Hall v. Small Business Administration, 695 F.2d 175 (1983), the new Fifth Circuit vacated a judgment of the district court presided over by a United States Magistrate because after the magistrate had mentally decided the sex discrimination case and while an opinion was being drafted by his law clerk, the latter accepted an offer of employment with the plaintiff's attorney which was not to commence until after the opinion was completed, notwithstanding the magistrate's statement that the law

clerk's opinion and work product playedno part in his decision.

In re Virginia Electric Co., 539 F.2d 357 (4th Cir. 1976), interpreted the statutory language, "any other interest that could be substantially affected by the outcome of the proceedings." Vepco had sued a supplier of materials. The materials apparently caused the station to use more expensive fuel for a nuclear power station. Vepco claimed as an element of damages monies which Vepco had surcharged its customers for the increased cost of fuel. If Vepco should prevail, the surcharge would be rescinded, and customers would receive a rebate. The trial judge was a customer of Vepco and thus could receive a rebate as a result of the litigation. The judge recused himself. Vepco sought review by petitions for interlocutory appeal and

supervisory writ of mandamus. The Fourth Circuit held that the judge abused his discretion in disqualifying himself.

In dictum, the appeals court ruled that the bare expectacny of an heir in an inheritance was "any other interest." The court suggested that the bare expectancy of a utility user in a rebate from a court case which concludes favorably for the user, and flows immediately from the conclusion of the case is "any other interest." The court ruled that an expectancy of an immediate rebate of $70 to $100 cash in hand is not de minimis, but the expectancy of $70 to $100 spread out over as many as 40 years and contingent on a specific outcome of the case and future regulatory action is de minimis.

C. APPLICATION OF LAW TO FACTS.

Quinault has no proof that Aetna made a direct payment of money to Judge Norton in return for a favorable decision in the Georgia Paneling Supply bankruptcy.

Quinault has proof that Aetna's attorneys Kutak, Rock & Huie rendered valuable services to Judge Norton for which he was paid substantial monies by third persons. Quinault has no proof that Kutak's Dobbs was paid for his work on the Chapter XII book. Without payment of royalties, Dobbs would expect some sort of a quid pro quo. Victory in court for a client as prestigious as Aetna in a contested matter with as serious charges as fraud and conversion in Georgia Paneling Supply would seem to be a reasonably appropriate payment for such extensive treatise writing.

The treatise-writing enterprise between Judge Norton and Kutak, Rock & Huie was so extensive that his interest in being a published author was practically and seriously inconsistent with being a judge in a vigorously contested pending matter involving Kutak, Rock & Huie's client Aetna.

An example of the foregoing is the following:

1. Quinault's FRCP 60(b) motion listed as a ground: "(3) fraud . . . misrepresentation, or other misconduct of any adverse party." See Second Amendment, filed June 10, 1977; transcript of July 19, 1977 in camera conference with Judge Freeman at pp. 3,4; district court orders filed July 22, 1977, August 26, 1977;

2. One misrepresentation complained of was Kutak's Dobbs' statements on May 18, 1976 at the settlement hearing before Judge Norton, to the effect that the simple facts of the case were that Aetna had made a loan to the bankrupt, when in fact "just one loan"

was made to Georgia Paneling Company, Inc.;

3. Kutak/Dobbs' misrepresentation was a subject matter in controversy;

4. Considering Judge Norton's business dealing with Dobbs, the judge had a financial interest in Dobb's conduct, for an affirmed finding of misrepresentation would probably dissuade Dobbs from assisting in the writing of books which would provde royalty income to Judge Norton, or would isrupt the relationship with Dobbs' partner Dixon who wa essential for assisting in the authorship of the treatise and keeping it current by supplementation.

Judge Norton was a customer of Kutak, Rock & Huie's treatise writing enterprise.

Judge Norton was zealously pursing the enhancement of his judicial reputation and the status of the United States Bankruptcy Courts. He was so zealous that he could not be fair in respect of Quinault's charges of judicial misconduct.

Having been charged with judicial misconduct, Judge Norton was a judge in his own case when he adjudged the charges to be baseless. In addition, he had personal knowledge of the extensive ex parte conferences and work sessions involving him and Kutak, Rock & Huie and could not be cross-examined.

While the following were under submission to Judge Norton:

(a) Aetna's motion for an award of costs, filed June 9, 1977, and determined June 13, 1977; and

(b) Quinault's FRCP 60(b) motion, filed May 31, 1977, and determined December 20, 1977;

Judge Norton, as presiding judge, and a defendant (Aetna) 's attorneys (Kutak) shared an ownership interest or privilege in a common-law copyright in Real Property Arrangements under Chapter XII, Federal Bankruptcy Act until copyrighted

by The Harrison Company on October 19, 1977, and a contractual interest in a United States Copyright thereafter.

During the course of Aetna's motion for an award of attroney's fees, filed September 1, 1977 and determined June 7, 19[illegible] (November 14, 1978), Judge Norton as presiding judge and Aetna's attorneys' Kutak, Rock & Huie shared through Kutak partner Harry D. Dixon, Jr. legal ownership interests in an unrelated common-law copyright to the "unfixed material" which became Volume 2 of Norton Bankruptcy Law and Practice (under 17 U.S.C. 301[b]) which was supplanted by a contractual interest in a United States Copyright held by Callaghan & Company to said treatise on and after September 2, 1981.

During the course of Aetna's motion for an award of attorney's fees, Kutak

Rock & Huie had in effect represented Judge Norton in negotiating a royalty agreement between the judge and Callaghan & Compnay in which Kutak's Dixon, Kincaid and Dobbs were third party creditor beneficiaries.

During the course of Aetna's motions for an award of costs and an award ofattorney's fees and Quinault's 60(b) motion, Judge Norton and Aetna's attorneys Kutak Rock & Huie had the following business dealings:

1. Kutak's Dobbs assisted in the writing of the Chapter XII book, the 1979 Supplement, the sales of which by The Harrison Company resulted in the receipt of royalty income by Judge Norton.

2. Kutak's Dixon and possibly Dobbs assisted Judge Norton

   (i) in contracting with Callaghan & Company for the publication of Norton Bankruptcy Law and Practice;

(ii) outlining Volume 2, an integral part of the treatise, which earned Judge Norton $12,000.00 of royalties from Callaghan & Company;

(iii) assuring Callaghan & Company of essential supplementation of the treatise so as to keep it current so sales would continue.

By entering a fee award in favor of Kutak, Rock & Huie's client Aetna, Judge Norton could be fairly certain that it would either be remitted to Kutak, Rock & Huie or that Aetna would be favorably disposed toward Kutak Rock & Huie.

Judge Norton had an interest in Kutak, Rock & Huie's financial well-beingto that its partners and lawyers could continue to render treatise writing services for him.

Judge Norton had a law clerk in the employ of a party to the proceeding. The law clerk was Kutak, Rock & Huie's Dobbs.

## IX. A JUDGE MAY NOT HAVE A BIAS FOR A PARTY OR A PREJUDICE AGAINST A PARTY IN A CASE BEFORE HIM.

Justice Black made the following statement for the Court In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955):

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." [Emphasis added.] 99 L.Ed. 946.

As will be recalled, the actual bias in Murchison was the carryover zeal and personal knowledge of the one-man judge-grand jury. There was no financial interest in the outcome. This case suggests that a judge's personal bias may deprive a litigant of due process. However, Chief Justice Taft stated for the Court in Tumey v. Ohio, 273 U.S. 510, 71 L.E. 749, 47 S.Ct. 437 (1927), as follows:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." [Emphasis added.] 71 L.Ed. 754.

In Chapman v. California, 386 U.S. 18, 17 L.E.2d 705, 87 S.Ct. 824 (1966), the Court held that "[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . ." , citing in footnote No. 8 to Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927) "(impartial judge)". 17 L.E.2d 710. Tumey v. Ohio involved a financial interest of the mayor of an Ohio village in convictions in his court.

Only a few decisions of this Court have examined claims of personal bias of a judge unaccompanied by contumacious misconduct by counsel. The Court in Berger v. United States, 255 U.S. 22, 65

L.Ed. 481, 41 S.Ct. 230 (1922), held that an affidavit of bias under the predecessor to 28 U.S.C. §144 was sufficient for disparaging remarks about German-Americans prior to a criminal trial of one such (1922). The Court in United States v. Grinnell Corp., 384 U.S. 563, 16 L.E.2d 778, 86 S.Ct. 1698 (1966), held that an affidavit charging a judge with pre-trial predetermination of the merits of an antitrust case was insufficient because:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 16 L.E.2d 793.

Thus, it is unclear whether the absence of actual bias is constitutionally mandated. It should be.

The Fifth Amendment not being a

certain basis for reversal for Judge Norton's bias and prejudice and Quinault having elected not to file an affidavit under 28 U.S.C. §144 (because of the feared retaliation of Judge Norton and Judge Freeman and unfavorable Fifth Circuit precedent), Quinault must perforce rely on 28 U.S.C. §455. There is wide disagreement among the Courts of Appeals on what type of personal bias is disqualifying. The Fifth Circuit requires an unrealistic showing. See, Davis v. Board of School Commissioners, 517 F.2d 1044 (5th Cir. 1975); Parrish v. Board of Commissioners of the Alabama State Bar., 524 F.2d 98 (5th Cir. 1975 en banc). Bound as it is to decisions of the old Fifth Circuit, Bonner v. City of Pritchard, Ala., 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit has the same position. Other circuits are much more critical of biased judicial conduct. See, e.g., Nicodemus v. Chrsyler Corp.,

596 F.2d 152 (6th Cir.1979); Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).

The record is replete with examples of actual bias. It has been stated that Judge Norton engaged in misrepresentations from the bench. Once uttered, the presumption of regularity of judicial proceedings was rebutted as a matter of law. The bankruptcy judge would know of the lie. He would know that the trustee whom he had breakfasted with would know of it. He would know that Aetna's lawyer who had written the 40-page opinion would know of it. His independence would be affected because they could inform the district court. If the latter would not have removed him from office, a reprimand and probable lack of reappointment would be indicated. Insidiously the lie would warp his judgment and his scruples. He would not be able to resist respondents'

insistence on the inclusion of language in a fee opinion drafted for him that absolutely exculpated them from petitioner's charges of unprofessional conduct. He would not be able to resist his own survival instincts to exculpate himself from petitioner's charges of misconduct. He would not be able to withhold a malevolent desire to hurt petitioner; indeed, so to bury petitioner in distorted facts of virtually nonreviewable, credibility findings that no court would listen to petitioners, presuming he had been unjustly provoked.

These emotions are ones this Court can presume from knowledge of human nature -- take judicial notice, if one prefers -- and they form a disabling bias or prejudice as a matter of law. While occurring in a court setting, these facts form an extrajudicial basis for a disabling personal bias calling for mandatory Judicial disqualification.

## VI.
## CONCLUSION
## and
## ARGUMENT ON THE ONE QUESTION OF EXCEPTIONAL IMPORTANCE

Judging appearances, not one of the Justices of this Court has contributed as much to legal literature as Judge Norton. Each has dedicated thousands of hours to the careful analysis of petitions, appeals, briefs, statutes, constitutional provisions. This leaves no time for treatise writing. Good judging presupposes good fact-finding. With an insight into the material facts, a judge can achieve an understanding of legal principles; thereafter a wise application of law to facts is assured.

Many judges believe that the most critical stage of litigation is determination of fact. A conscientious effort must be made by the trial judge, within his proper role, to elicit truth. If accomplished, then regardless of

judicial differences on the correct legal principles to apply, litigants and counsel know the process has functioned well and are assured. But if fact finding is flawed, observers within and without the process are disturbed and the finest appellate judge cannot effect a result consistent with the actual facts. For the appellate system accords a presumption of correctness to fact finding. No judicial system is any stronger than the process for assuring that the emergence of the true facts in accordance with the rules of procedure and evidence.

In Judge Norton's courtroom in this and many other cases, the truth could not emerge. The truth was never important. What was important was personalties. And personalties were important because the trial judge's interests were focused on developing a reputation as a bankruptcy law innovator, a bankruptcy law scholar,

a leader of the bankruptcy bench and bar. There is no harm in simple ambition. But it can be blind. The flaw here is that Judge Norton is not endowed with the gifts of an Oliver Wendell Holmes, Jr.; and he could satisfy personal hunger for legal reknown only with the assistance of numerous lawyers, law students and law firms. An interest in judicial administration provided the support initially. Perhaps easy virtue thereafter.

Judge Norton's courtroom and the judicial effort required therein became in time a chore to be endured, a means to effect a change in the law thought desirable (with scant regard for the facts at hand), or a threat to blind ambition.

Fate brought petitioner to this courtroom, but it refused institutional justice. The first chapter of an

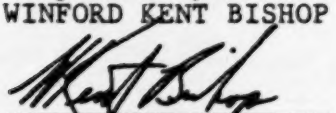
encounter with a Judicial Juggernault, although unsuccessful, was not, it is suggested, without influence. For the Nation itself has for over a year been deadlocked over the status of bankruptcy judges. The occasion, of course, is the holding in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 73 L.E.2d 598, 102 S.Ct. 2858 (1982), that a provision of the Bankruptcy Reform Act of 1978 which in effect grants Art I or adjunct judges the judicial power of the United States under Art III is unconstitutional. Petitioner believes that Quinault Pacific Corp. v. Aetna Business Credit, Inc. has been noted by influential members of this Court. If not, similar unreported incidents in and around bankruptcy court have contributed to national paralysis. Today, bankruptcy is big business in the United States, but most incumbent bankruptcy judges were appointed at a time when their ranks were not filled from the leading lights of the

legal profession. Petitioner respectfully suggests that if the first chapter of this case had been considered fully, Congress and the President would not be stymied over resolution of the predicament caused by Marathon, nor would the public be mystified why the Chief Justice, many circuit judges, district judges and members of the private bar say, No, to the simplest solution: elevate all of the bankruptcy judges to Art III status, and stop the battle of semantics/turf.

It is because of the present bankruptcy law conundrum and political realities that this case should be resolved by this Court. The greater issue is not this bankruptcy judge. It is whether this Nation is to have the common law tradition of individual justice, or an alien system of institutionalized justice of broad strokes for fine factual analysis.

"The sentence of today will make the right and wrong of tomorrow.", as Justice Cardozo observed; */ but the ultimate resolution of this case will shape the future course of our judicial system and the quality of justice it administers.

Respectfully submitted,
WINFORD KENT BISHOP



Counsel for Quinault
Pacific Corporation

1835 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383
404/658-1110

---

20/ Benjamin N. Cardozo, The Nature of the Judicial Process (1921) at 21.

## CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the within and foregoing "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit re Concealment of Business Relationships Between Bankuptcy Judge and Opposing Counsel" upon counsel for each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to same at their last known business addresses, as follows:

BARCLAYS AMERICAN/BUSINESS CREDIT, INC.
c/o Kutak, Rock & Huie
41 Marietta Street, N.W.
Atlanta, Georgia 30303

JOHN C. PENNINGTON
c/o Pennington, Goetz & Cronkright
Peachtree Palisades Building,
4th Floor
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309

FREEMAN & HAWKINS
c/o Paul W. Hawkins, General Partner
First Atlanta Tower, 28th Floor
Two Peachtree Street, N.W.
Atlanta, Georgia 30383

THE CITIZENS AND SOUTHERN NATIONAL BANK
c/o William C. Humpreys, Jr., Esq.
35 Broad Street, N.W.
Atlanta, Georgia 30303

INTERNATIONAL PAPER COMPANY
c/o Jeffrey M. Smith, Esq.
First Atlanta Tower, 22nd Floor
Two Peachtree Street, N.W.
Atlanta, Georgia 30383

THE FLINTKOTE COMPANY
c/o T. H. Parke, Esq.
The Flintkote Company
580 Decker Drive
Irving, Texas 75062

ICG VISTA PETROLEUMS, INC.
c/o John E. Carstairs, Corporate Secretary
1700-444 St. Mary Avenue
Winnipeg, Manitoba, Canada R3C 3T7

This 26th day of October, 1983.

W. Kent Bishop
Counsel for Quinault
Pacific Corporation, Petitioner.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

NO. 83-8357

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et. al.,

Respondents,

and

THE FLINTKOTE COMPANY, et al.,

Involuntary Petitioners,

* * * * * * * * *

In Re: GEORGIA PANELING SUPPLY, INC.,

Discharged Bankrupt,

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et al.,

Respondents.

---

Application for Extraordinary Writ

---

[Filed June 2, 1983]

Before GODBOLD, Chief Judge, FAY and JOHNSON, Circuit Judges.

B Y T H E C O U R T :

IT IS ORDERED that the motion of petitioner for an extraordinary writ is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

NO. 83-8357

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et. al.,

Respondents,

and

THE FLINTKOTE COMPANY, et al.,

Involuntary Petitioners,

* * * * * * * * *

In Re: GEORGIA PANELING SUPPLY, INC.,

Discharged Bankrupt,

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et al.,

Respondents.

Application for Extraordinary Writ

[Filed June 13, 1983]

Before GODBOLD, Chief Judge, FAY and JOHNSON, Circuit Judges.

B Y T H E C O U R T :

The motion of Barclays American/Business Credit, Inc. for award of expenses and attorney's fees is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

NO. 83-8357

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et. al.,

Respondents,

and

THE FLINTKOTE COMPANY, et al.,

Involuntary Petitioners,

* * * * * * * * *

In Re: GEORGIA PANELING SUPPLY, INC.,

Discharged Bankrupt,

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., et al.,

Respondents.

---

Application for Extraordinary Writ

---

[Filed June 16, 1983]

Before GODBOLD, Chief Judge, FAY and JOHNSON, Circuit Judges.

B Y T H E C O U R T :

The motion of Quinault to supplement its petition for an extraordinary writ and for an extension of time to file a petition for rehearing en banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

---

No. 83-8357

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., JOHN C. PENNINGTON, FREEMAN & HAWKINS, CITIZENS & SOUTHERN NATIONAL BANK, INTERNATIONAL PAPER COMPANY,

Respondents.

FLINTKOTE COMPANY, ICG VISTA PETROLEUMS, INC.,

Involuntary Petitioners/ deemed respondents.

- - - - - - - - - - - - -

Application for Extraordinary Writ

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion __, 11 Cir., 198_, __F.2d__)

(July 28, 1983)

Before GODBOLD, Chief Judge, and JUDGES FAY and JOHNSON, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
United States Circuit Judge

REHG-6
(Rev. 6/82)

Office - Supreme Court, U.S
FILED
NOV 25 1983
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

---

No. 83-708

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

v.

BARCLAYSAMERICAN/BUSINESS CREDIT, INC., et al.,

Respondents.

---

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

# BRIEF OF RESPONDENT BARCLAYSAMERICAN/ BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Paul A. Howell, Jr.
Counsel of Record
R. William Ide, III
KUTAK ROCK & HUIE
1200 Anchor Savings Bank Building
Atlanta, Georgia 30303
(404) 522-8700

Attorneys For Respondent Barclays-American/Business Credit, Inc.

Dated: November 23, 1983

## QUESTION PRESENTED

WHETHER THIS COURT WILL VACATE THE LAW OF THE CASE ESTABLISHED IN DECISIONS RENDERED BY THE FIFTH CIRCUIT COURT OF APPEALS THREE YEARS AGO, AND REOPEN THIS CASE WHICH IS NOW MOOT, A SETTLEMENT AGREEMENT HAVING BEEN ENTERED BY THE PARTIES AND A CONSENT DISMISSAL, WITH PREJUDICE, HAVING BEEN ENTERED BY THE DISTRICT COURT ON FEBRUARY 5, 1982, FROM WHICH NO APPEAL WAS TAKEN?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED..... | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iv |
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 3 |
| STATEMENT OF THE CASE..... | 3 |
| Introduction..... | 3 |
| History Of The Cases Involving BarclaysAmerican And Quinault..... | 6 |
| SUMMARY OF ARGUMENT..... | 17 |
| REASONS FOR DENYING THE WRIT..... | 18 |
| A. THERE IS NO CASE OR CONTROVERSY PENDING ON WHICH THIS COURT SHOULD ACT..... | 18 |

(TABLE OF CONTENTS)


| | Page |
|---|---|
| B. THERE IS NO GROUND ON WHICH THE LAW OF THE CASE SHOULD BE ABROGATED..... | 21 |
| C. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AND NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED WHICH THIS COURT SHOULD SETTLE..... | 25 |
| D. QUINAULT HAS NOT TAKEN A TIMELY APPEAL FROM ANY JUDGMENT, ORDER OR DECREE WHICH IS SUBJECT TO REVIEW.... | 26 |
| CONCLUSION..... | 27 |
| APPENDIX | |
| SETTLEMENT AGREEMENT AND RELEASE | A-1 |
| ORDER DISMISSING QUINAULT'S CLAIMS, WITH PREJUDICE | A-2 |

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| In Re: Georgia Paneling, 607 F.2d 117, reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 616 F.2d 893 (5th Cir. 1980), cert. denied. sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, 66 L.Ed.2d 218, 101 S.Ct. 360 (1980), reh. denied, 449 U.S. 1104, 66 L.Ed.2d 832, 101 S.Ct. 905 (1981)..... | passim |
| In Re: Georgia Paneling, 607 F.2d 1004 (unpublished opinion) (Table 1979), reh. granted, 613 F.2d 312 (Table 1979), original order reinstated, 617 F.2d 293 (Table 1980) (5th Cir.), | |

Cases Page

cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, 66 L.Ed.2d 218, 101 S.Ct. 360 (1980), reh. denied, 449 U.S. 1104, 66 L.Ed.2d 832, 101 S.Ct. 905 (1981)..... passim

In Re: Georgia Paneling, 588 F.2d 93, reh. granted, 581 F.2d 520 (5th Cir. 1978).... passim

Drachenberg v. Canal Barge Co., 621 F.2d 760, 762, reh. denied, 626 F.2d 172 (5th Cir. 1980)..... 21,22

In Re: S.L.E., Inc., 674 F.2d 359, 362-364 (5th Cir. 1982)..... 19

J. Aron & Co. v. Mississippi Shipping Co., 361 U.S. 115, 4 L.Ed.2d 148, 80 S.Ct. 212 (1959) (per curiam)..... 18

| Cases | Page |
|---|---|
| Kremens v. Bartley, 431 U.S. 119, 128-29, 52 L.Ed.2d 184, 97 S.Ct. 1709 (1977)..... | 18 |
| Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir.), cert. denied, 404 U.S. 840, 30 L.Ed.2d 73, 92 S.Ct. 132 (1971)..... | 26 |
| United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982..... | 22 |
| Verret v. Oil Transport Co., 365 U.S. 768, 6 L.Ed.2d 83, 81 S.Ct. 911 (1961) (per curiam)..... | 18 |
| White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).... | 22,23 |

NO. 83-708

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

---

QUINAULT PACIFIC CORPORATION,

Petitioner,

v.

BARCLAYSAMERICAN/BUSINESS CREDIT, INC., et al.

Respondents.

---

# BRIEF OF RESPONDENT BARCLAYSAMERICAN/ BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

## OPINIONS BELOW

In re: Georgia Paneling, 607 F.2d 117, reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 616 F.2d 893 (5th Cir. 1980), cert. denied. sub nom Quinault Pacific Corp. v. Aetna Business Credit,

Inc., 449 U.S. 954, 66 L.Ed.2d 218, 101 S.Ct. 360 (1980), reh. denied, 449 U.S. 1104, 66 L.Ed.2d 832, 101 S.Ct. 905 (1981);

In re: Georgia Paneling, 607 F.2d 1004 (unpublished opinion) (Table 1979), reh. granted, 613 F.2d 312 (Table 1979), original order reinstated, 617 F.2d 293 (Table 1980) (5th Cir.), cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, 66 L.Ed.2d 218, 101 S.Ct. 360 (1980), reh. denied, 449 U.S. 1104, 66 L.Ed.2d 832, 101 S.Ct. 905 (1981).

See also In Re: Georgia Paneling, 588 F.2d 93, reh. granted, 581 F.2d 520 (5th Cir. 1978).

The order of the Eleventh Circuit Court of Appeals denying Quinault's Petition For Extraordinary Writ is not reported. Likewise, the Court's Order denying a rehearing and the Order denying

BarclaysAmerican's request for attorney's fees are not reported. These Orders are reprinted in the Appendix to the Petition For Writ Of Certiorari.

## JURISDICTION

Jurisdiction over the matters in Quinault's Petition For Writ Of Certiorari does not lie in this Court because this case presents no live case or controversy and Quinault did not file a timely appeal from any judgment or order subject to review.

## STATEMENT OF THE CASE

### Introduction

On May 20, 1983, Quinault Pacific Corporation [hereinafter "Quinault"] filed

what it labeled as a Petition For Extraordinary Writ[1/] naming BarclaysAmerican/ Business Credit, Inc. [hereinafter "BarclaysAmerican"] and others, as Respondents. Quinault's Petition For Extraordinary Writ was not filed as a timely appeal from any judgment or decision which was

---

1 The full title of the Petition For Extraordinary Writ was "Petition For Extraordinary Writ To Recall Mandates, Devalidate Judgments, Vacate Orders of June 3, 1980 Denying Rehearings Procured By Concealment Of Prohibited Financial Relationships Involving Bankruptcy Judge And Cousel, To Permit Filing of Independent Action, To Allow Out-Of-Time Petition For Rehearing en Banc, For Other Relief; And Memorandum."

subject to appeal. Instead, Quinault sought to have the Eleventh Circuit Court of Appeals reverse the law of the case laid down by the Fifth Circuit Court of Appeals in appeals taken by Quinault almost five years ago. The Fifth Circuit Court of Appeals had addressed and decided in earlier decisions the same issues which Quinault sought to raise anew in its Petition For Extraordinary Writ. This Court had denied certiorari in those cases. In re: Georgia Paneling, 607 F.2d 117, reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 616 F.2d 893 (5th Cir. 1980) cert. denied. sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981); In re: Georgia Paneling, 607 F.2d 1004 (unpublished opinion) (Table 1979), reh. granted, 613 F.2d 312 (Table 1979), original order reinstated, 617 F.2d

293 (Table 1980) (5th Cir.), cert. denied. sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981). See also In re: Georgia Paneling, 588 F.2d 93, reh. granted, 581 F.2d 520 (5th Cir. 1978).

In addition to the fact that the Fifth Circuit Court of Appeals has already decided the issues raised by Quinault, the claim which Quinault seeks to resurrect has been compromised, settled and dismissed, with prejudice, by Quinault.

The Eleventh Circuit Court of Appeals denied the Petition For Extraordinary Writ on June 2, 1983 and denied a request for rehearing on July 28, 1983.

History Of The Cases Involving BarclaysAmerican And Quinault

In 1974, Georgia Paneling, Inc. was declared bankrupt and John Pennington was

elected Trustee [hereinafter "Trustee"] by Quinault and other unsecured creditors. In July 1975, Trustee filed suit on behalf of the bankrupt against Aetna Business Credit, Inc. [Aetna Business Credit, Inc. later became known as BarclaysAmerican/ Business Credit and will be referred to as "BarclaysAmerican"] and the Citizens and Southern Bank ("C&S") to set aside the transfer of certain property.[2/] The Trustee filed that action at the urging of Quinault's counsel, Mr. Bishop.

---

2 A more complete discussion of the facts involved in the bankruptcy case and the plenary action may be found in the briefs filed by Aetna Business Credit, Inc. in opposition to the writ of certiorari in case numbers 80-344 and 80-345.

After the Trustee had conducted an investigation of the claims against BarclaysAmerican, the Trustee determined the claims were unfounded and sought permission of the Bankruptcy Court, Honorable William L. Norton. Jr., to settle those claims for costs. Quinault, and several other unsecured creditors of Georgia Paneling, objected to the settlement. Quinault also sought to intervene in the lawsuit in order to assert claims of its own against BarclaysAmerican and C&S.

On June 17, 1976, settlement between the Trustee and BarclaysAmerican was approved by the Bankruptcy Court, which determined that no facts existed to support a recovery by the Trustee against BarclaysAmerican. Quinault appealed this order to the United States District Court, Honorable Richard C. Freeman. The

District Court affirmed the order of settlement on April 15, 1977.

In the meantime, Quinault had been allowed to intervene as a plaintiff in the suit filed by the Trustee against Barclays-American and C&S, to assert the same claims that the Trustee had asserted, as well as certain state law claims. Quinault sought to recover from Barclays-American and C&S, inter alia, the sum of $12,974.89 for goods it sold to Georgia Paneling but for which it was not paid.

On May 31, 1977, Quinault moved, pursuant to Rule 60(b), Federal Rules of Civil Procedure, the District Court to set aside its order affirming the settlement between the Trustee and BarclaysAmerican. The Rule 60(b) motion was denied by the Bankruptcy Court, to whom it had been remanded, on December 20, 1977. On appeal by Quinault, the District Court affirmed this decision on June 26, 1978.

BarclaysAmerican applied for an assessment of the legal expenses it had incurred in defending the settlement agreement against the frivolous and vexatious attacks of Quinault. Because Quinault's opposition to the proposed settlement had been vexatious and oppressive, the Bankruptcy Court, on June 7, 1978, ordered Quinault, and the other intervenors, to pay the sum of $5,146.50 to BarclaysAmerican, and made similar awards to the Trustee and Trustee's counsel. This order was affirmed by the District Court on August 30, 1978, and, after a rehearing on Quinault's reguest for reconsideration, was reaffirmed on October 13, 1978 and February 20, 1979.

Quinault appealed both the ruling on its 60(b) motion and the award of attorney's fees to the Fifth Circuit Court of Appeals. (Appeal Nos. 78-8283, 78-3370,

79-1076). In its appeals, Quinault set forth the unfounded and slanderous allegations of misconduct and improprieties which it, reasserted in its Petition For Extraordinary Writ and now renews in its Petition For Writ Of Certiorari. Quinault claimed that the Bankruptcy Court and counsel maintained an improper relationship, had committed a fraud on Quinault and on the Fifth Circuit Court of Appeals, had acted improperly and unethically, and that the Bankruptcy Court was partial and unfair. Quinault also accused the District Court of improper conduct.

Quinault charged, inter alia:

> that the bankruptcy judge demonstrated partiality, lacked judicial integrity, and made materially misleading statements. The bankruptcy judge is also alleged to have engaged in

ex parte discussions with appellees and their counsel, permitted orders and an opinion to be drafted and typed by appellees or their counsel, and misrepresented the facts regarding this alleged misbehavior. Appellants also argue that the district judge's affirmance is entitled to no weight because he engaged in various acts of misbehavior.

In Re Georgia Paneling, 607 F.2d 117, 118, reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 616 F.2d 893 (5th Cir. 1980), cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981).

The Fifth Circuit Court of Appeals determined:

> A careful examination of the record, especially those portions cited by appellants, reveals no impropriety. The allegations of misconduct are unfounded.

In Re Georgia Paneling, 607 F.2d 117, 118, reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 616 F.2d 893 (5th Cir. 1980), cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954. reh. denied, 449 U.S. 1104 (1981).

The Fifth Circuit also addressed the substantive merits of Quinault's 60(b) motion and determined that the motion had been denied properly. In Re Georgia Paneling, 607 F.2d 117, 118. reh. granted, 613 F.2d 137 (1979), orig. opin. reinstated, 617 F.2d 293 (5th Cir. 1980), cert. denied, sub nom Quinault Pacific

Corporation v. Aetna Business Credit, Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981).

The Fifth Circuit Court of Appeals also addressed the allegations of impropriety raised on appeal in the attorney's fees case and likewise found no impropriety.

> A careful examination of the record convinces us that appellants have failed to demonstrate judicial impropriety. Their brief does not accurately construe the record, and on more than one occasion conclusory allegations are made without reference to supporting evidence.

In Re Georgia Paneling Supply, Inc., 607 F.2d 1004 (unpublished opinion), (Table November 9, 1979), reh. granted, 613 F.2d 512 (Table, December 28, 1979), orig. opin. reinstated, 617 F.2d 293 (5th Cir.,

Table 1980), cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S 954. reh. denied, 449 U.S. 1104 (1981).

Moreover, the Fifth Circuit Court of Appeals determined that Quinault was guilty of bad faith, vexatiousness and oppressive tactics and affirmed the award of attorney's fees. In Re Georgia Paneling Supply, Inc., 607 F.2d 1004 (unpublished opinion), (Table November 9, 1979), reh. granted, 613 F.2d 512 (Table, December 28, 1979), orig. opin. reinstated, 617 F.2d 293 (5th Cir., Table 1980), cert. denied, sub nom Quinault Pacific Corp. v. Aetna Business Credit, Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981).

Quinault then petitioned for certiorari asserting again the unfounded and slanderous allegations against the

Bankruptcy Judge, the District Judge and counsel. Quinault Pacific Corporation, v. Aetna Business Credit. Inc., Petitions For Writ Of Certiorari, Nos. 80-344 & 80-345, October Term, 1980. This Court denied the Petitions for Writ of Certiorari and requests for rehearing. Quinault Pacific Corp. v. Aetna Business Credit Inc., 449 U.S. 954, reh. denied, 449 U.S. 1104 (1981).

Quinault's claim that Barclays-American should pay it the sum of $12,974.89, and other damages, for goods Quinault sold to Georgia Paneling, proceeded to trial before the Honorable Richard C. Freeman and a jury in October 1981. After two days of trial, Quinault settled its claims against Barclays-American and C&S and the parties executed general releases. (A copy of the General Release executed by Quinault is reproduced

in Appendix A-1 hereto). With the consent of Quinault and its counsel, Quinault's claims against BarclaysAmerican were dismissed, with prejudice, on February 5, 1982. (A copy of the dismissal is reproduced in Appendix A-2 hereto). No appeal was taken from the dismissal of Quinault's claims.

## SUMMARY OF ARGUMENT

Quinault's Petition For Writ of Certiorari does not present a case or controversy to this Court for review. The issues are moot since Quinault has settled all of its claims against BarclaysAmerican and its case has been dismissed with prejudice. The issues raised by Quinault have been decided previously by the Fifth Circuit Court of Appeals and this Court, whose decisions constitute the law of the

case. Quinault's renewed accusations do not present any issue on which there are conflicting appellate decisions, nor do they present an important question of federal law which has not been, but should be, settled by this Court. Finally, this matter is not properly before this Court because Quinault did not file a timely notice of appeal from any order or judgment subject to review.

## REASONS FOR DENYING THE WRIT

### A. THERE IS NO CASE OR CONTROVERSY PENDING ON WHICH THIS COURT SHOULD ACT.

Article III of the Constitution of the United States establishes and limits the judicial powers of the Courts of the United States. This Court will act only

on matters which present a "live case or controversy before this Court. . . ." Kremens v. Bartley, 431 U.S. 119, 128-29, 52 L.Ed.2d 184, 97 S.Ct. 1709 (1977). This Court has held that the settlement of a case by the parties thereto renders the case moot. Verret v. Oil Transport Co., 365 U.S. 768, 6 L.Ed.2d 83, 81 S.Ct. 911 (1961) (per curiam); J. Aron & Co. v. Mississippi Shipping Co., 361 U.S. 115, 4 L.Ed.2d 148, 80 S.Ct. 212 (1959) (per curiam); See also, In Re: S.L.E., Inc., 674 F.2d 359, 362-364 (5th Cir. 1982).

The case at bar presents no case or controversy. Quinault settled its claims with BarclaysAmerican on October 21, 1981, and the parties executed mutual and general releases. (Appendix A-1). Mr. Johnson, Quinault's president, executed, on behalf of Quinault, a release which provides in part that Quinault did:

> RELEASE, ACQUIT AND FOREVER DISCHARGE C&S AND BARCLAYS . . . from any and all claims . . . known or unknown, of any kind or character that . . . Quinault . . . ever had or on the date hereof may have against either Barclays or C&S by reason of the alleged acts, transactions, or occurrences that are described in any complaint, amended complaint, motion, brief or any other document filed in the aforesaid civil action at any time. . . .

(Appendix A-1)

Mr. Bishop recognized that all of Quinault's claims had been settled and stated in pleadings filed with the District Court:

> Mr. Bishop having consented to substitution of counsel and discharge of bond, and having elected not to

assert a lien herein for attorneys' fees in this case, and all parties and their counsel having consented to dismissal of the case efficient administration of justice would be served by finally closing, for good, this case.

(Petition For Extraordinary Writ, p. 347)

On February 5, 1982, the trial court entered an Order, with the consent of Quinault, dismissing its claims against BarclaysAmerican, with prejudice. (Appendix A-2). Thus, there is no case or controversy pending and the issues presented are moot.

B. THERE IS NO GROUND ON WHICH THE LAW OF THE CASE SHOULD BE ABROGATED.

The law of the case has been established. There were no grounds upon

which to grant Quinault's 60(b) motion; Quinault's conduct was vexatious and oppressive justifying the award of attorneys fees; and there was no judicial impropriety.

Quinault seeks to have this Court vacate the law of the case established almost three years ago in cases which are now closed. The law of the case cannot be reversed. Drachenberg v. Canal Barge Co., 621 F.2d 760, 762, reh. denied, 626 F.2d 172 (5th Cir. 1980). Quinault is bound by the findings of fact and conclusions of law made by the court of appeals in its prior appeals unless: "(1) a subseguent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work a manifest injustice." United States

v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982) Quinault does not suggest, nor do the facts support, that any of the exceptions apply to the matter at bar.

> The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," [fn] and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof. [fn]

White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).

The matter at bar demonstrates the necessity of this doctrine. Even Quinault has given lip service to the importance of finality in the litigation process: "There should be an end to litigation: a litigant is entitled to one, but only one, "day" in court. Settlement of complex litigation achieving finality should be encouraged." Reply Brief of Quinault, p. 6, filed September 11, 1979, Case No. 78-3370, In Re Georgia Paneling, (Fifth Circuit Court of Appeals).

Quinault raised the same issues of alleged impropriety of the court and counsel in the numerous briefs it filed with the Fifth Circuit Court of Appeals and the Supreme Court in the earlier appeals. Quinault devoted over 60% of the 285 pages of argument in those briefs to

its unfounded claim that the orders of the Bankruptcy Court and the District Court should be reversed because of partiality and impropriety. The Fifth Circuit Court of Appeals addressed this issue and found no impropriety. More importantly, the Fifth Circuit Court of Appeals determined that the decisions of the lower courts were proper. In short, Quinault had its day in court on its 60(b) motion and on the assessment of expenses against it and it is not entitled to a second bite.

C. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AND NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED WHICH THIS COURT SHOULD SETTLE.

Quinault has alleged, but never provided any citations to support its claim, that a conflict between circuits

existed on the issue of whether attorney's fees should have been assessed against it. There is no such conflict.

Quinault's renewed allegations and slanderous accusations do not present an important question of federal law which has not been, but should be, settled by this Court.

D. QUINAULT HAS NOT TAKEN A TIMELY APPEAL FROM ANY JUDGMENT, ORDER OR DECREE WHICH IS SUBJECT TO REVIEW.

The United States Code provides, in part, that "no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107.

The failure to file a timely notice of appeal requires dismissal of the appeal. Lathrop v. Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir.), cert. denied, 404 U.S. 840, 30 L.Ed.2d 73, 92 S.Ct. 132 (1971). In the case at bar, the last order entered was the order dismissing, with prejudice, Quinault's claims. This order was filed on February 5, 1982. Quinault filed no appeal from the order and took no action whatsoever until over fifteen months later, when it filed the Petition For Extraordinary Writ. Since Quinault did not file a timely notice of appeal seeking review by the Court of Appeals, it may not present this case to this Court.

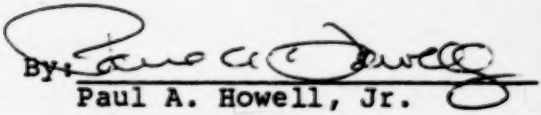
## CONCLUSION

For the foregoing reasons, Quinault's

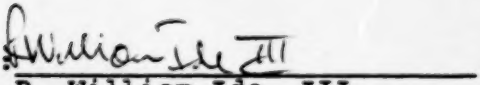
Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

KUTAK ROCK & HUIE

By: 
Paul A. Howell, Jr.

Counsel of Record

By: 
R. William Ide, III

1200 Anchor Savings
Bank Building
Atlanta, Georgia 30303
(404) 522-8700

# APPENDIX

RELEASE

WHEREAS, International Paper Company, Gold Rey Forest Products, Inc., Quinault Pacific Corporation and White Lumber Sales Company (hereinafter collectively referred to as "Plaintiffs") are Plaintiffs in a certain civil action for damages styled, International Paper Company, et al. v. Aetna Business Credit, Inc. and The C & S Bank of North Fulton, being Civil Action File No. C75-1540A, wherein Plaintiffs seek to recover from Aetna Business Credit, Inc. ("Aetna") and The C & S Bank of North Fulton (hereinafter collectively referred to as "Defendants") the amount of the purchase price of certain goods sold by Plaintiffs to Georgia Paneling Supply, Inc. for which Plaintiffs did not receive payment and other damages; and

WHEREAS, Defendants have disputed and continue to dispute the claims asserted

against them by Plaintiffs and Aetna has filed a counterclaim for attorneys' fees in said action against Plaintiffs; and

WHEREAS, Plaintiffs have disputed and continue to dispute the counterclaim asserted against them by Aetna; and

WHEREAS, The Citizens and Southern National Bank ("C&S") has assumed the liabilities and owns all of the assets of The C & S Bank of North Fulton; Barclays American/Business Credit, Inc. ("Barclays") has assumed the liabilities and owns all of the assets of Aetna which at the time Barclays' acquired same included the Aetna claims as herein described against Plaintiffs; The Flintkote Company ("Flintkote") has assumed the liabilities and owns all of the assets of White Lumber Sales Company; ICG Vista Petroleum Ltd. ("ICG") has assumed the liabilities and owns all the assets of

Gold Rey Forest Products, Inc.; and the parties desire to settle all claims and demands that each of them may have against the other that are described in the aforesaid civil action or that arose in or are connected in any way therewith.

NOW, THEREFORE, for and in consideration of the mutual releases contained herein, and other valuable consideration, the receipt and sufficiency of which is severally acknowledged, the parties hereto agree as follows:

1.

International Paper Company ("International"), ICG, Flintkote and Quinault Pacific Corporation ("Quinault") hereby jointly and severally, for themselves and their respective predecessors, successors, assigns, parent companies and subsidiary companies, now and forever, RELEASE, ACQUIT and FOREVER DISCHARGE C&S

and Barclays, jointly and severally, and their respective predecessors, successors, assigns, parent companies, and subsidiary companies, from any and all claims, demands, actions, causes of action, debts, reckonings or rights, whether at law or in equity, known or unknown, actual or contingent, of any kind or character that International, ICG, Flintkote and Quinault, their predecessors, successors, related companies or any of them, ever had or on the date hereof may have against either Barclays or C&S by reason of any of the alleged acts, transactions, or occurrences that are described in any complaint, amended complaint, motion, brief or any other document filed in the aforesaid civil action at any time, including, without limitation, any claims for attorneys' fees and costs and any breaches of any alleged settlement agreement made

at any time between or among any of the parties hereto.

2.

Barclays and C&S hereto jointly and severally, for themselves and their respective predecessors, successors, assigns, parent companies and subsidiary companies, now and forever, RELEASE, ACQUIT and FOREVER DISCHARGE International, ICG, Flintkote and Quinault, jointly and severally, and their respective predecessors, successors, assigns, parent companies and subsidiary companies from any and all claims, demands, actions, causes of action, debts, reckonings or rights, whether at law or in equity, known or unknown, actual or contingent, of any kind or character that Barclays and C&S, their predecessors, successors, related companies or any of them, ever had or on the date hereof may have against

International, ICG, Flintkote and Quinault, or any of them, for attorneys' fees or costs incurred by C&S, Barclays, their predecessors, successors or related companies in the defense of the aforesaid civil action or arising out of any act, activity, statement or position heretofore taken or made that is in any way related to the aforesaid civil action or is in any way thereto connected, involved or related.

3.

It is agreed and fully understood that neither this Release nor the consideration given hereunder is or is in any way to be construed as an admission of liability or wrongdoing on the part of any signatory hereto or such signatory's predecessors in interest.

4.

Each of the parties hereto do hereby represent, warrant and affirm that the

execution of this Release has been duly authorized and that the individual person signing on behalf of each of them has the requisite authority and approval to do so; that, by so executing this Release, the provisions hereof are adopted by and become the act and deed of each of them; that, before executing this Release, each of them fully informed itself of the terms, contents and effects hereof and has had the benefit of the advice of attorneys of its own choosing; that each of them fully understands that the consideration given hereunder is all of the consideration that is ever to be given to any of them for their execution of this Release; that none of them have transferred, assigned or pledged to any person or entity whatsoever any claim that it releases herein; that it is the owner of the claim that it releases herein.

5.

This Release may be executed in six counterparts and each counterpart, when signed, shall be fully binding upon each of the parties hereto.

6.

This Release shall be governed in all respects by and construed in accordance with the laws of the State of Georgia.

IN WITNESS WHEREOF, the parties hereto have caused this Release to be signed, sealed and delivered by their duly authorized representatives, as of the 21st day of October, 1981.

BARCLAYS AMERICAN/BUSINESS CREDIT, INC. (Successor in interest to Aetna Business Credit, Inc.)

[CORPORATE SEAL]

By /s/ Rick Polivy

Its: Sr V P

THE CITIZENS AND SOUTHERN NATIONAL BANK (Successor in interest to The C & S Bank of North Fulton)

[CORPORATE SEAL]

By /s/
Its: Sr Vice President

INTERNATIONAL PAPER COMPANY

[CORPORATE SEAL]

By /s/
Its: Vice President

THE FLINTKOTE COMPANY (Successor in interest to White Lumber Sales Company)

[CORPORATE SEAL]

By /s/
Its: Vice President

ICG VISTA PETROLEUMS LTD. (Successor in interest to Gold Rey Forest Products, Inc.)

[CORPORATE SEAL]

By /s/
Its: Vice President

QUINAULT PACIFIC CORPORATION (Successor in interest to Versapanel, Inc.)

[CORPORATE SEAL]

By /s/ A. R. Johnson
Its: President

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

| | | |
|---|---|---|
| INTERNATIONAL PAPER COMPANY, et al., | ) | |
| Plaintiffs, | ) | CIVIL ACTION |
| v. | ) | FILE NO. C75-1540A |
| AETNA BUSINESS CREDIT, INC., et al., | ) | |
| Defendants | ) | |

ORDER

Upon the consent of the parties, as shown by the signatures below of their respective attorneys of record, it is hereby:

ORDERED that Plaintiffs' Third Amended Complaint and all other complaints herein against Defendant THE C&S BANK OF NORTH FULTON are hereby dismissed WITH PREJUDICE; and it is further

ORDERED that Plaintiffs' Fourth Amended Complaint and all other complaints herein against Defendant AETNA BUSINESS CREDIT, INC. are hereby dismissed WITH PREJUDICE; and it is further

ORDERED that neither Defendant C&S nor Defendant AETNA shall seek to recover, nor shall they recover, from Plaintiffs herein any attorneys' fees or costs incurred by said Defendants in this case; and it is further

ORDERED that the counterclaim of Defendant AETNA, to the extent it has not already been dismissed by the Court's prior orders, is hereby dismissed WITH PREJUDICE; and it is further

ORDERED that the parties to this case shall bear their own costs in this case and no party shall seek to recover, nor shall they recover, from any other party

any costs or attorneys' fees incurred by such party herein.

So ordered, in Atlanta, Georgia, this 5th day of February, 1982.

/s/
RICHARD C. FREEMAN, United States District Court Judge

The above and foregoing Order is hereby consented to:

KUTAK ROCK & HUIE

By: /s/
C. Edward Dobbs

Attorneys for Aetna Business Credit, Inc.

ALSTON, MILLER & GAINES

By: /s/
William C. Humphreys, Jr.

Attorneys for The C&S Bank of North Fulton

TROTTER, BONDURANT, MILLER & HISHON

By: /s/
Jeffrey M. Smith

Attorneys for International Paper Company

GREENE, BUCKLEY, DeRIEUX & JONES

By: /s/
Gregory J. Digel

Attorneys for Quinault Pacific Corporation (successor in interest to Versapanel, Inc.), The Flintkote Company (successor in interest to White Lumber Sales Company), and Gold Rey Forest Products, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing BarclaysAmerican/Business Credit, Inc.'s Brief In Opposition To Petition For Certiorari, with the Appendix modified pursuant to the Court's request, were served upon the following people by depositing copies of same in the United States Mail, with adequate postage prepaid and properly addressed to:

W. Kent Bishop
1835 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, GA 30383

John C. Pennington
c/o Pennington, Goetz & Cronkright
Peachtree Palisades Building
4th Floor
1819 Peachtree Road, N.E.
Atlanta, GA 30309

Freeman & Hawkins
c/o Paul W. Hawkins, General Partner

First Atlanta Tower
28th Floor
Two Peachtree Street, N.W.
Atlanta, GA 30383

Copies of the Brief In Opposition To Petition For Certiorari, with the original Appendix, were served on the foregoing persons on November 23, 1983.

This 2 day of December, 1983.

Paul A. Howell, Jr.

KUTAK ROCK & HUIE
1200 Anchor Savings
Bank Building
Atlanta, GA 30303
(404) 522-8700

Office-Supreme Court, U.S.
FILED
JAN 3 1984
ALEXANDER L. STEVAS,
CLERK

No. 83 - 708

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

QUINAULT PACIFIC CORPORATION,

Petitioner,

versus

BARCLAYS AMERICAN/BUSINESS CREDIT, INC., etc., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT RE CONCEALMENT OF BUSINESS RELATIONSHIPS BETWEEN BANKRUPTCY JUDGE AND OPPOSING COUNSEL

# REPLY BRIEF OF PETITIONER

WINFORD KENT BISHOP
Counsel for Petitioner
1835 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-1110

Dated: January 3, 1984.

I.

## QUESTIONS PRESENTED BY BRIEF OF RESPONDENT BARCLAYS/AETNA

(1) Whether a special release, limited to other claims "described" */ in a separate plenary action **/, is a bar to reopening a previously-ended bankruptcy proceeding infected with fraud, then unknown to petitioner.

---

*/ The word "described" is the qualifying word used to limit the extent of the release. See (resubmitted) Brief of Respondent, Appendix A-1 at A-1-4, unnumbered line 15; see (original) Brief of Respondent, Appendix A-1 at unnumbered page 2 and unnumbered line 17 (photocopy of special release, photographically reduced).

**/ Pennington v. Aetna Business Credit, Inc., N.D.GA., Civil Action No. C75-1540A, filed August 5, 1975.

(2) Whether a petition for extraordinary writ addressed to a court of appeals (modeled on Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 [1944]) is available to raise the issue of fraud on that court and on this Court.

(3) Whether allegations of prohibited financial relationships between bankruptcy judge and opposing counsel have ever been raised in this litigation. ***/

---

***/ "[N]o pecuniary interest can be proven. . . ." Cert. Petition No. 80-344, at 28.

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | Questions Presented By Brief of Respondent Barclays/Aetna. . . . . | i |
| II. | Table of Contents . . . . . | ii |
| III. | Table of Authorities. . . . | iii |
| IV. | Summary of Barclays/ Aetna's Contentions . . . . | 1 |
| V. | Summary of Quinault's Response. . . . . | 2 |
| VI. | Supplemental Statement of Facts. . . . . | 5 |
| | A. Early Termination of Bankruptcy Proceedings | 5 |
| | B. Pennington v. Aetna. . | 6 |
| | C. Parties to the Release | 7 |
| | D. Dynamics of the Release | 7 |
| | E. Method of Execution and Unauthorized Change of Language of Release . . | 10 |
| | F. Execution of Dismissal with Prejudice . . . . | 12 |
| | G. Bankruptcy Court (W. D. WASH.) Considered Fact Of Release, Determined Same Was Not Binding on Quinault. . | 12 |
| | ARGUMENT | |
| VII. | Neither Release Nor Dismissal Bars This Proceeding. . . . . | 14 |

VIII. Petition for Extraordinary Writ in Court of Appeals Is Available to Raise Issue of Fraud. . . . . 17

IX. Business Dealings Between Bankruptcy Judge and Opposing Counsel Were Not Raised Prior to 1983 . . . . 19

X. Conclusion . . . . . 20

XI. Certificate of Service . . . 21

XII. Appendix . . . . . A-4
A. Application to Employ Georgia Counsel . . . . . A-4-1
B. Order Authorizing Employment of Counsel . . . . . A-4-5

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L.E.2d 351, 98 S.Ct. 2454 (1978). . . . . | 15 |
| Georgia Power Co. v. Busbin, 149 Ga. App. 274, 254 S.E.2d 146 (1979). . . . | 15 |
| Glisson v. Burkhalter, 31 Ga. App. 365, 120 S.E. 664 (1923) . . . . . | 14 |
| Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944). . . . . | ii, 4 |
| In re Georgia Paneling Supply, Inc., (Case No. 79-1076): 616 F.2d 893 (5th Cir. 1980), reinstating 607 F.2d 117 (1979), vacated 613 F.2d 137 (1979), resulting from petition for appeal allowed at 588 F.2d 93 (1978), vacating 581 F.2d 520 (1978). . . | .passim |
| In re Georgia Paneling Supply, Inc. (Case No. 78-3370): 617 F.2d 293 (5th Cir. 1980, Table). reinstating 607 F.2d 1004 (1979), vacated 613 F.2d 312 (1979), rehearing denied 618 F.2d 1389 (1980) . . | passim |
| In re Georgia Paneling Supply, Inc., Bankrupt, Bankruptcy No. B74-1628A, N.D.Ga., June 24, 1974. . . . . | passim |
| In re Quinault Pacific Corporation, Debtor, No. 83-00023, W.D. WASH., January 3, 1983. . . . . | 13, 14, A-4 |

Kinnear-Weed v. Humble Oil & Refining Co., 403 F.2d 437 (5th Cir. 1968). . . .16

Maxwell v. Bishop, 385 U.S. 650, 17 L.E.2d 671, 87 S.Ct. 768 (1967). 5, 18

Nodvin v. Fabian, 153 Ga. App. 716, 266 SE2d 253 (1980) . . . . . .9, 10

Page v. Holiday Inns, Inc., 245 Ga. 12, 262 S.E.2d 783 (1980) . . . . . 16

Pennington, Trustee for Georgia Paneling Supply, Inc. v. Aetna Business Credit, Inc., N.D.GA., Civil Action No. C75-1540A, filed August 5, 1975. . . . i, 2, 6, 7, 14

Quinault Pacific Corporation v. Aetna Business Credit, Inc., 448 U.S. 915, 65 L.E.2d 1178, 101 S.Ct. 35 (1980), 449 U.S. 954, 66 L.E.2d 218, 101 S.Ct. 360 (1980); 449 U.S. 1104, 66 L.E.2d 832, 101 S.Ct. 905 (1981). . . . . ii, 5, 11

Universal Oil Products Co. v. Root Refining Co., Inc., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946) 18

United States v. Ohio Power Co., 353 U.S. 98, 1 L.E.2d 683, 77S.Ct. 652 (1957). . . . . 5, 18

Statutes

OCGA §9-11-8(c). . . . . 14
OCGA §24-7-2 . . . . . .15

United States
Constitution

Article III, Section 2, Clause 2 . . . 17

Other

Federal Rule of Civil
Procedure 8 (c) . . . . . 14

Federal Rule of Appellate
Procedure 27 (b). . . . . 20

## IV.

## SUMMARY OF BARCLAYS/AETNA'S CONTENTIONS

Barclays/Aetna makes the following three assertions in its resubmitted brief:

(1) The release signed by Quinault and Barclays/Aetna is a general release, extinguishes Quinault's claims against Barclays/Aetna, leaves no case or controversy pending, and moots all matters raised in the cert. petition.

(2) Quinault makes "the same claims" as previously.

(3) There was no proper proceeding below, and this Court lacks jurisdicition to hear this matter.

V.

SUMMARY OF
QUINAULT'S RESPONSE

(1) The release was altered by Barclays/Aetna or the C&S Bank after Quinault's execution without Quinault's knowledge and while it was not represented by counsel. (Pet.E.Writ ¶147)

The release is a special release: it applies only to other claims "described" in a separate plenary lawsuit, Pennington v. Aetna. (Pet.E.Writ ¶148) The relief sought in the court of appeals in respect of Pennington v. Aetna is limited to recording the transactions accomplished by the court. (Pet.E.Writ p63).

The release did not bar any relitigation of the bankruptcy matters as to which this petition for writ of

certiorari appertains.

The financial relationships between bankruptcy judge and Barclays/Aetna's counsel were not known at time the release was made. (Pet.E.Writ p72,3)

The trustee in bankruptcy was not a party to the release nor was his counsel (himself), or his co-counsel Freeman and Hawkins, both respondents in this certiorari effort. So much of the relief sought against them by the petition for extraordinary writ could not have been extinguished. The release did not purport to bar Quinault's claim against the trustee or Freeman and Hawkins. Neither has filed a brief here.

(2) Barclays/Aetna claims that some 60 per cent of 285 pages in Quinault's

briefs in the old Fifth Circuit pertaining to the bankruptcy proceeding was devoted to argument on the improprieties and misconduct of the bankruptcy judge. Whether true or not, not one page refers to the publishing enterprise between the bankruptcy judge and Barclays/Aetna's counsel. No counter-proof was adduced by Barclays/Aetna in the court of appeals that any statement in the petition for extraordinary writ was not truthful.

(3) A petition for extraordinary writ as filed in the Court of Appeals is a procedure sanctioned by the Supreme Court in Hazel Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). This Court could deem the lnstant cert. petition to be a motion for leave to file a second petition for

rehearing in respect of the original petition for certiorari which was denied November 3, 1980, and as to which a first petition for rehearing was denied January 12, 1981. United States v. Ohio Power Co., 353 U.S. 98 (1957). This matter may be considered a common law writ of certiorari as to which the Supreme Court's discretion is substantial. Cf. Maxwell v. Bishop, 385 U.S. 650 (1967).

## VI.

## SUPPLEMENTAL STATEMENT OF FACTS

### A. Early Termination of Bankruptcy Proceedings

The Georgia Paneling Supply bankruptcy was closed after this court denied a petition for writ of certiorari and a petition for rehearing. (There is no evidence of the closing in the record.) After the closing there were no

further proceedings pertaining to the bankruptcy until the petition for extraordinary writ was filed in the Court of Appeals on May 20, 1983.

B. Pennington v. Aetna

After this court's denial of the petition for rehearing of the denial of certiorari, Pennington v. Aetna was reactivated. On April 2, 1981, the trustee was dismissed from the lawsuit on a joint motion by him and C&S to sever. His remaining claims against C&S were settled. (There is no evidence of this order in the record.) What remained for trial in October, 1981, were the claims of Quinault and its three intervenors against Aetna and the C&S Bank and the counterclaims of Aetna. After a day of trial, the litigation was terminated and

a draft sketch of release was initialed by the litigating parties. (Cf. Pet.E.Writ p74).

C. Parties to the Release

The trustee in bankruptcy was not a party to the release; the trustee in bankruptcy's attorney, the trustee himself, was not a party; the trustee's co-counsel, Freeman and Hawkins, was not a party. The release does not refer to the bankruptcy proceedings. The release in no way affects claims made in the bankruptcy proceeding.

D. Dynamics of Release

The trial of Pennington v. Aetna began with the District Judge affected by a prejudice against Quinault for the

front page newspaper story which had appeared on the very day the judge had out-of-town guests. (Pet.E.Writ ¶144) The judge admitted this fact only after settlement of the case had been announced on the record. (Pet.E.Writ p68)

International Paper Company's attorney was working on a contingency basis with a separate contract that should the case be settled by International Paper over his objection and without his consent, he would be entitled to an attorney's fee based on a reduced hourly fee. International Paper announced to its attorney that it had settled the case for zero dollars and the attorney would not be paid the sum agreed. (Pet.E.Writ ¶146A; p73) The attorney objected to the settlement. Under Georgia law an attorney in a

contingency case has a right to continue the case to trial if there is no payment of a reasonable fee upon a settlement, although the client wishes to settle, or has purportedly settled, the case. Nodvin v. Fabian, 153 Ga.App. 716, 266 S.E.2d 253 (1980).

The attorney could have continued the action in the name of International Paper against Barclays/Aetna and the C&S Bank, obtained a recovery from the defendants, and from any recovery paid his own fee and remitted the balance to International Paper. International Paper did not want the suit to continue. If the litigation were continued, there would be the risk of an attorney's fee award against International Paper on defendant's counterclaims for malicious use of process. International Paper

wanted protection in the form of a counterclaim against its (former) attorney. (Pet.E.Writ ¶146; p429)

Also Barclays/Aetna wanted a damage remedy in the form of a malicious use of process counterclaim against International Paper's attorney to discourage him from continuing a Nodvin v. Fabian claim. (Pet.E.Writ p429)

For these reasons it was important that the special release not bar either International Paper or Barclays/Aetna from asserting counterclaims against International Paper's former attorney. Accordingly, the draft sketch of special release was carefully recrafted so as to apply only to claims that had been "described" in the separate plenary litigation itself and not claims that

could arise after settlement. (Pet.E.Writ ¶150)

E. Method of Execution and Unauthorized Change of Language of Release

The special release was drafted by Kutak, Rock & Huie partner C. Edward Dobbs ("Kutak/Dobbs") and C&S's attorney Wm. C. Humphreys, Jr. and sent to International Paper for execution. (Pet.E.Writ ¶146) Thereafter it was sent to Inter-City Gas Corporation for execution and then to Quinault Pacific Corporation. When Quinault's president, Mr. Allard R. Johnson, received the release, neither he nor Quinault was represented by counsel. (Pet.E.Writ p71,72) He read it and signed it. He then sent it to Kutak/Dobbs and Mr. Humphreys. After Mr. Johnson mailed the six counterparts of the executed release and (presumptively) before the settlement

was concluded, the language of the release was changed without his approval. (Pet.E.Writ ¶147, p74) The change itself was erasing the "shall" and typing in "may" in the first line of paragraph 5 of the release on page A-1-8 of respondent's resubmitted appendix A-1. (Cf. photocopied release on third unnumbered page in original brief of Barclays/Aetna.)

F. The Execution of the Consent Dismissal with Prejudice

Execution of the special release was accomplished without counsel (Pet.E.Writ p71), but Mr. Johnson was advised he needed counsel to induce the district judge to sign the dismissal. Specially-retained counsel executed same for Quinault (and two other intervenors) which the district judge accepted in

entering the order of dismissal. (Pet.E.Writ p147)

### G. Bankruptcy Court for Western District of Washington Considered Fact of Release and Determined Same Was Not Binding on Quinault

Through separate bankruptcy counsel, Quinault applied to the Bankruptcy Court for the Western District of Washington for authority to employ Georgia counsel to pursue remedies in Georgia to reopen the closed bankruptcy proceedings. (Pet.E.Writ ¶3) Quinault's application, which is reproduced in appendix A-4 hereto, clearly indicates that the bankruptcy litigation in Georgia had come to an end and relitigation was barred by ordinary principles of res judicata. For example, the application states:

"Applicant previously attempted to pursue its rights as a creditor of Georgia Paneling and may have been denied an impartial hearing as result of alleged impermissable business dealings between the bankruptcy judge and counsel in the then-pending bankruptcy of Georgia Paneling.

"Applicant intends to resume its attempts to recover its loss through an action in the proper forum of Georgia".[Emphasis added.]

VII.

NEITHER RELEASE NOR DISMISSAL BARS THIS PROCEEDING

Release, res judicata, accord and satisfaction, laches are affirmative defenses. OCGA §9-11-8(c); FRCP 8(c). The burden of proving these defenses is on the proponent thereof. To sustain the burden assumed by Barclays/Aetna a showing is required that the particular matter in controversy (business relationships between judge and counsel) was necessarily or actually involved in

the former litigation. Glisson v. Burkhalter, 31 Ga. App. 365, 366-367, 120 S.E. 664 (1923).

The release is governed by Georgia law, according to its terms. It specifically refers to the plenary action, Pennington v. Aetna, but not to the Georgia Paneling Supply, Inc., bankruptcy. Barclays/Aetna has not shown that the special release refers to the bankruptcy proceeding.

This Court will closely scrutinize a settlement document when an allegation of mootness is made. Coopers & Lybrand v. Livesay, 437 U.S. 463, 466, n.3, 57 L.E.2d 351, 356, n.3, 98 S.Ct. 2454 (1978) (settlement held to be "tentative"). The release bears clear evidence of alteration. OCGA §24-7-2

provides that "the party offering it in evidence shall explain the alteration. . . ." Barclays/Aetna has not explained the alteration. The release would not be admissible in evidence. Georgia Power Co. v. Busbin, 149 Ga. App. 274 (15) at 279, 254 S.E.2d 146 (1979). Therefore, this Court should disregard the release.

A voluntary dismissal with prejudice entered by mistake is not res judicata. Page v. Holiday Inns, Inc., 245 Ga. 12, 262 S.E.2d 783 (1980). But considered as res judicata, it is an affirmative defense. In the Eleventh Circuit, this affirmative defense is unavailable when fraud on the court is claimed. Kinnear-Weed Corp. v. Humble Oil & Refining Co., 403 F.2d 437 at 439-440 (5th Cir. 1968):

"At the same time we decline to accept Humble's plea of res judicata **** [T]his is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata, collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below." [Emphasis added.]

VIII.

PETITION FOR EXTRAORDINARY WRIT IN COURT OF APPEALS IS AVAILABLE TO RAISE ISSUE OF FRAUD

The original jurisdiction of the Supreme Court is limited in the United States Constitution by Article III, Section 2, Clause 2. Apparently, the Supreme Court lacks the inherent power to rectify a fraud upon it. Accordingly, a defrauded petitioner's remedy would seem to be threefold:

(1) to file a petition for an extraordinary writ in the court of

appeals and then to seek a review by certiorari under Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944); or

(2) to seek a second rehearing (implies a first denied rehearing -- as was the case here) of a denial of certiorari under United States v. Ohio Power Co., 353 U.S. 98, 1 L.E.2d 683, 77 S.Ct. 652 (1957); or

(3) to seek a common-law writ of certiorari. Cf. Maxwell v. Bishop, 385 U.S. 650, 17 L.E.2d 671, 87 S.Ct. 768 (1967).

Filing a petition for an extraordinary writ in the court of appeals is also appropriate where the litigating parties have settled but an attorney for one of the settling parties calls to the attention of the court a fraud thereon. Universal Oil Products Co. v. Root Refining Co., Inc., 328 U.S. 575, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946). Quinault's attorney did not settle with Barclays/Aetna or its attorneys, nor did he represent Quinault

at the time of the purported settlement. (Pet.E.Writ p71.72)

## IX.

## BUSINESS DEALINGS BETWEEN BANKRUPTCY JUDGE AND OPPOSING COUNSEL WERE NOT RAISED PRIOR TO 1983

Barclays/Aetna contends that the same issues raised in the petition for extraordinary writ were raised in the 1980 certiorari petitions. This is untrue. The cert. petition in Case No. 80-344 on file in the archives of this court states that "no pecuniary interest [between Barclays/Aetna and the bankruptcy judge] can be proven. . . ." Cert. petition 80-344 at page28. No pecuniary interest was alleged, or known, at the time and for two years thereafter.

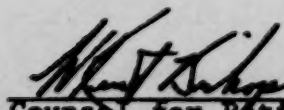
The fact that Barclays/Aetna states that the improprieties and misconduct are "unfounded" and "slanderous" should be given no weight for Barclays/Aetna could have filed a counter-affidavit in the court of appeals but chose not to do so. FRAP 27 (b).

IV.

CONCLUSION

For the reasons given, the response of Barclays/Aetna is legally insufficient to deny certiorari in this case of utmost moment.

Respectfully submitted,
WINFORD KENT BISHOP



Counsel for Petitioner

1835 First Atlanta Tower
Two Peachtree Street, N.W.
Atlanta, Georgia 30383
404/658-1110

## CERTIFICATE OF SERVICE

I hereby certify that I have served one copy of the within and foregoing "Reply Brief of Petitioner" in respect of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit re Concealment of Business Relationships Between Bankuptcy Judge and Opposing Counsel upon counsel for each respondent by depositing same in the United States Mail, sufficient postage prepaid affixed thereon, properly addressed at last known business addresses, as follows:

BARCLAYS AMERICAN/BUSINESS CREDIT, INC.
c/o Paul A. Howell, Jr., Kutak, Rock & Huie
41 Marietta Street, N.W.
Atlanta, Georgia 30303

JOHN C. PENNINGTON
c/o Pennington, Goetz & Cronkright
Peachtree Palisades Building,
4th Floor
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309

FREEMAN & HAWKINS
c/o Paul W. Hawkins, General Partner
First Atlanta Tower, 28th Floor
Two Peachtree Street, N.W.
Atlanta, Georgia 30383

THE CITIZENS AND SOUTHERN NATIONAL BANK
c/o William C. Humpreys, Jr., Esq.
35 Broad Street, N.W.
Atlanta, Georgia 30303

INTERNATIONAL PAPER COMPANY
c/o Jeffrey M. Smith, Esq.
First Atlanta Tower, 22nd Floor
Two Peachtree Street, N.W.
Atlanta, Georgia 30383

THE FLINTKOTE COMPANY
c/o T. H. Parke, Esq.
The Flintkote Company
580 Decker Drive
Irving, Texas 75062

ICG VISTA PETROLEUMS, INC.
c/o John E. Carstairs, Corporate Secretary
1700-444 St. Mary Avenue
Winnipeg, Manitoba, Canada R3C 3T7

This 3 day of January, 1984.

W. Kent Bishop
Counsel for Quinault
Pacific Corporation, Petitioner.

# APPENDIX A-4

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| In Re<br><br>QUINAULT PACIFIC CORPORATION,<br><br>Defendant. | CAUSE NO. 83-00023<br><br>APPLICATION TO EMPLOY GEORGIA COUNSEL |

FILED U.S. Bankruptcy Court Western District of Washington at Seattle FEB 14 1983 Lewis P. Stephenson Clerk of the Bankruptcy Court

Filed /s/
Lodged
Calendar
Docketed /s/

Applicant respectfully represents:

1. Applicant is the debtor in possession.

2. Applicant desires to employ Winford Kent Bishop, of Two Peachtree Street Northwest, Atlanta, Georgia, who is duly admitted to practice in the courts of the State of Georgia, to prosecute in a court of competent jurisdiction in Georgia an action not related to the Applicant's reorganization.

3. Applicant has selected Mr. Bishop for the following reasons:

a. Mr. Bishop previously represented Applicant in the Georgia matter to the satisfaction of Applicant. Mr. Bishop is entirely familiar with the matter and well qualified to act as Applicant's attorney for that matter.

4. Applicant has a need to employ an attorney to represent it in this Georgia matter for the following reasons:

a. Applicant lost approximately $13,000 in Georgia through transactions with Georgia Paneling Supply, Inc. and a related corporation.

b. Applicant previously attempted to pursue its rights as a creditor of Georgia Paneling but may have been denied an impartial hearing as a result of alleged impermissable business

dealings between the bankruptcy judge and counsel in the then-pending bankruptcy of Georgia Paneling.

c. Applicant intends to resume its attempts to recover its loss through an action in the proper forum in Georgia.

5. W. Kent Bishop has been listed among the Applicant's ten largest unsecured creditors. Mr. Bishop has a claim against Applicant for fees for services rendered in an amount of approximately $17,000.00

6. It is contemplated that Mr. Bishop will seek compensation based on normal and usual billing rates and that he will seek interim compensation during the case as permitted by 11 U.S.C.§31.

WHEREFORE, Applicant requests that it be authorized to employ W. Kent Bishop, to represent Applicant and render

services in the matter described above with compensation to be paid as an adminstrative expense in such amounts as this court may hereinafter determine and allow.

DATED this 10 day of February, 1983.

QUINAULT PACIFIC CORPORATION

By

John H. Strasburger

Attorney for Debtor in Possession



Law Offices of
Short & Cressman
30th Floor, Seattle First
National Bank Bldg.
1001 Fourth Avenue
Seattle, Washington 98154
682-3333

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

| | | |
|---|---|---|
| In Re | ) | CAUSE NO. |
| | ) | 83-00023 |
| QUINAULT PACIFIC | ) | |
| CORPORATION, | ) | ORDER AUTHO- |
| | ) | RIZING EM- |
| Defendant. | ) | PLOYMENT OF |
| | | COUNSEL |

FILED U.S. Bankruptcy Court Western District of Washington at Seattle FEB 14 1983 Lewis P. Stephenson Clerk of the Bankruptcy Court

Filed /s/
Lodged
Calendar
Docketed /s/

The Court having considered the Application of the debtor in possession to employ Georgia counsel, and it appearing that the employment of W. Kent Bishop, although presently an unsecured creditor of Applicant, is in the best interest of the estate, it is hereby

ORDERED that Quinault Pacific Corporation, debtor in possession herein,

is authorized to employ W. Kent Bishop, of Atlanta, Georgia, as counsel for the specific purposes outlined in the Application, with compensation to be paid in such amounts as may be allowed by the court on proper application or applications therefore.

DATED this 14 day of FEB, 1983.

Samuel J. Steiner

SAMUEL J. STEINER
U.S. Bankruptcy Judge

Presented by:

John H. Strasburger
JOHN H. STRASBURGER
of Short & Cressman
Attorneys for Defendant

ORDER AUTHORIZING EMPLOYMENT
OF COUNSEL - 1-

Law Offices of
Short & Cressman
30th Floor, Seattle First National
Bank Bldg.
1001 Fourth Avenue
Seattle, Washington 98154
682-3333